Court File No. CV-25-00003786-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

FARM CREDIT CANADA

Applicant

- and -

14713737 CANADA INC.

Respondent

APPLICATION UNDER SUBSECTION 243 OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT,* R.S.O. 1990, c. C.43, AS AMENDED

FACTUM OF ALBERT GELMAN INC., IN ITS CAPACITY AS COURT-APPOINTED RECEIVER OF 14713737 CANADA INC.

(Motion returnable March 10, 2026)

March 5, 2026

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PART I - OVERVIEW

1. Albert Gelman Inc. ("**AGI**") is the court-appointed receiver (in that capacity, "**Receiver**") of the assets, undertakings, and property (collectively, "**Property**") of 14713737 Canada Inc. ("**Company**"), including the real property municipally known as 7372 and 7388 Guelph Line, Milton, Ontario ("**Real Property**").

2. The Receiver files this factum in support of its motion for two orders:

   (a) an order ("**Sale Process Approval Order**"), *inter alia*, approving a Sale Process (as defined herein) for the Real Property and related relief; and

   (b) an order ("**Ancillary Order**"), *inter alia*, (i) directing the Company's Directors and Officers (defined below) to comply with their obligations under paragraphs 5 and 6 of the Appointment Order and granting related relief; (ii) approving the Receiver's termination of the Company's lease contracts with the Commercial Tenants (defined below); (iii) ordering and authorizing the removal of abandoned vehicles and equipment from the Real Property; (iv) approving the Receiver's first report to the court dated January 14, 2026 ("**First Report**"), and the March 4, 2026 supplement to the First Report ("**Supplemental Report**"), and the activities of the Receiver described therein; and (v) approving the accounts of the Receiver and Miller Thomson for the period to and including December 31, 2025.

3. *The Sale Process Approval Order should be granted*: The Receiver has determined that the proposed Sale Process is the best path forward for this insolvency proceeding as it is the only

reasonable means to obtain recovery for stakeholders, including the first mortgagee, FCC. This is not an "exceptional" case where it is proper for a court to reject a receiver's business judgment.[1]

4. *The Ancillary Order should be granted*:

(a) the Directors and Officers have not materially responded to multiple requests from the Receiver to provide copies of the Company's balance sheets, profit and loss statements, cash flow statements, equipment lists, and other books and records. These are fundamental corporate documents which, if obtained, will ensure that the Receiver can maximize the value of the Company's receivership estate;

(b) the Appointment Order authorizes the Receiver to "…cease to perform any contracts of the Debtor…". The Commercial Tenants have not paid rent since the date of the Appointment Order and the Commercial Tenants' continued occupation of the Real Property will degrade the market value of same and is likely to lead to regulatory enforcement action;

(c) removal of vehicles from the Real Property is necessary to maximise its market value and to comply with orders from the Niagara Escarpment Commission ("**NEC**");

(d) the Receiver has acted responsibly and carried out its activities in a manner consistent with the provisions of its Appointment Order (defined below); and

(e) the professionals' fees described in the fee affidavits appended to the First Report ("**Professionals' Fees**") are fair and reasonable in the circumstances and reflect value for service.

[1] *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 (CanLII), at paras. 6, 15.

PART II - SUMMARY OF FACTS

5. Capitalized words that are otherwise not defined herein have the meanings given to them in the First Report.

6. The factual background to this proceeding can be found in (a) the affidavit of Jason Inman, Senior Account Manager for the applicant, Farm Credit Canada ("**FCC**"), sworn July 15, 2025; (b) the First Report; and (c) the Supplemental Report. The facts necessary for the determination of the within motion are set out below.

7. On August 22, 2025, Justice Cudjoe granted an order ("**Appointment Order**") appointing AGI as Receiver, without security, over all of the Property of the Company.[2]

The Company

8. The Company is a real property holding company. Its only known material asset is the Real Property. Its current directors are Daniel Piszko, Manmeet Kaur Shoker, Azad Singh Goyat, and Charalambos Keketisids; Narinder Shoker is a former director (collectively, the "**Directors and Officers**").[3]

Lack of Cooperation from the Directors and Officers

9. As described above and in the First Report, the Receiver has made repeated requests of the Directors and Officers for Company books and records. Shoker, Goyat, and Keketisids, have not responded. While director Piszko has provided some information, he does not possess most of the requested documents.[4]

[2] Appointment Order, Motion Record, Tab 2A.

[3] First Report, Motion Record Tab 2, para. 8.

[4] First Report, supra note 3, para. 17-19.

The Real Property

10. The Company acquired the Real Property in March 2023.[5]

11. The Real Property is approximately 142 acres of agricultural land. The land is comprised of two parcels, the Farm Parcel and the Residential Parcel. The "**Farm Parcel**" is approximately 138.4 acres of land and includes of two residences, a barn, a fruit market and a commercial warehouse with offices; the farmable acreage is leased annually to a local farmer to grow field crops. The "**Residential Parcel**" parcel is approximately 4.1 acres of land and includes a vacant residence.[6]

12. The Real Property is located within the Niagara Escarpment segment in the Town of Milton, a landform with a unique set of features protected by the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2 (the "**Act**"), by means of the Niagara Escarpment Plan ("**Plan**").[7]

13. The use of the Real Property is regulated by the Niagara Escarpment Commission ("**NEC**"') in accordance with the Plan. The Plan limits the uses of the Real Property to limited to agricultural, "accessory",[8] or pre-1985 existing uses.[9]

[5] First Report, supra note 3, para. 12.

[6] First Supplement, Supplemental Motion Record Tab 1, para. 10; First Report, supra note 3, para. 11.

[7] First Report, supra note 3, para. 30-31.

[8] *I.e.* subordinate and connected to the principal, approved use.

[9] First Report, supra note 3, para. 31-33.

The Commercial Tenants

14. Three tenants (collectively, the "**Commercial Tenants**") carry on business from the property's commercial buildings.[10]

(a) **Green City Produce Inc.:** Operates a cold storage facility. It has a five-year written lease (expiring November 2029) at $11,865 per month.[11]

(b) **Turbo Masters Inc.:** Operates a motor vehicle repair business. Monthly rent is reportedly $7,910. A written lease purportedly exists but has not been provided to the Receiver.[12]

(c) **6671943 Ontario Inc. (o/a Viva Logistics):** Operates a trucking business. Monthly rent is $1,921. There is no written lease.[13]

15. None of the Commercial Tenants have paid rent to the Receiver since the date of the Appointment Order.[14]

Regulatory non-compliance

16. The NEC has advised the Receiver that the businesses being carried on by the Commercial Tenants are not compliant with the Plan as they are not connected to the principal agricultural use of the Real Property; none of the Commercial Tenants' uses are pre-1985 existing uses.[15]

[10] First Report, supra note 3, para. 12-15.
[11] First Report, supra note 3, para. 13.
[12] First Report, supra note 3, para. 14.
[13] First Report, supra note 3, para. 15.
[14] First Report, supra note 3, para. 12-15.
[15] First Report, supra note 3, para. 41-42.

17. Since the date of the Appointment Order, the Receiver has attended the Real Property on several occasions and observed two categories of Vehicles on the Real Property: (A) vehicles connected to the operation of the Commercial Tenants' businesses (the "**Commercial Vehicles**"), including but not limited to vehicles being stored and/or repaired by Turbo Masters; and (B) inoperable and/or abandoned vehicles (the "**Abandoned Vehicles**" and, together with the Commercial Vehicles, the "**Vehicles**").[16]

18. On January 13, 2026, the NEC issued a Notice of Violation to each of the Company, Green City and Turbo Masters (each a "**Notice of Violation**"). The Notices of Violation are substantially similar. The Notices of Violation stated that the recipient is engaged in an unapproved use of the Real Property and demanded that the recipient, by no later than February 28, 2026:

    (a) "permanently cease the operation of the aforementioned unauthorized commercial/industrial land uses"; and

    (b) "permanently remove, or cause to be removed, all commercial vehicles incidental to the unauthorized land uses to an appropriate off-site location."[17]

19. The Notices of Violation concluded by stating that "failure to adequately address this issue could result in further compliance action" and that fines for the stated violations could range from $25,000 to $50,000.[18]

[16] First Report, supra note 3, para. 39.

[17] First Report, supra note 3, para. 43.

[18] Ibid.

20. Penalties for violation of the Plan are set out in sections 24 and 27 of the Act, and may include, amongst other things, stop-work orders, demolition orders, and tax consequences.[19]

21. The Receiver's counsel responded to the NEC on January 27, 2026, advising of the March 10, 2026 motion date and requesting that the NEC not take further compliance action against the Company prior to the outcome of the March 10 motion.[20]

22. That same day, the NEC agreed to extend its compliance deadline from February 28 to March 31, 2026.[21]

Disclaimer notices

23. The Receiver is authorized by the Appointment Order to cease to perform Company contracts.

24. The Receiver issued notices of disclaimer ("**Disclaimer Notices**") to all Commercial Tenants on September 19, 2025. These notices terminated the Commercial Tenants' leases effective October 19, 2025. The Disclaimer Notices further advised that any property remaining after the deadline would be deemed abandoned and would be disposed of.[22]

25. None of the Commercial Tenants objected to the Disclaimer Notices. However, none of the Commercial Tenants have vacated the Real Property as of the date of writing and none have demonstrated an intention to do so.[23]

[19] First Report, supra note 3, para. 49(a).
[20] First Supplement, supra note 6, para. 7.
[21] First Supplement, supra note 6, para. 8.
[22] First Report, supra note 3, para. 45-46.
[23] First Report, supra note 3, para. 47-48.

Sale process

26. The Receiver believes that a public marketing process for the Real Property will maximize value for stakeholders. Prior attempts to close unsolicited offers have been unsuccessful.[24]

27. From late January through mid February 2026, the Receiver evaluated prospective advisors and listing agents for the Real Property; selected CBRE and Remax as its sale process advisor and listing agent; and, in consultation with CBRE, developed sale process procedures and milestones for the Real Property.[25]

28. The Receiver undertook the following process to select a listing agent for the Real Property.

    (a) The Receiver solicited and received listing proposals from each of CBRE, Cushman & Wakefield, Colliers, and Avison Young, all of whom the Receiver considers to be market-leading real estate services firms.[26]

    (b) The Receiver reviewed each listing proposal against the following criteria:

        (i) experience selling real property similar in nature and geography to the Real Property;

        (ii) experience selling real property in receivership mandates;

        (iii) proposed marketing and sales strategy; and

        (iv) commission and fee structure.[27]

[24] First Report, supra note 3, para. 54-55.

[25] First Supplement, supra note 6, para. 11-12.

[26] Ibid.

[27] Ibid.

29. Based on the above criteria, the Receiver determined CBRE's listing proposal, which included Remax as co-listing agent, to be superior and on February 18 entered into listing agreements with CBRE and Remax, for each parcel of the Real Property.[28]

30. The Receiver proposes the following sale process (the "**Sale Process**") for the Real Property.[29]

Pre-marketing

a. CBRE will prepare, subject to the Receiver's approval, a multi-page, high-gloss, full-color brochure for each parcel of the Real Property, which will include high resolution aerial photography (the "**Brochure**").

b. CBRE will prepare and maintain a site-specific, confidential, data room for each parcel of the Real Property, which data rooms will include the ability to track who has accessed and downloaded information. Access to the data room(s) will be subject to confidentiality agreements acceptable to the Receiver in its sole discretion.

c. The Receiver will have the exclusive right to (i) approve or reject marketing materials and (ii) the inclusion of documents in the data room(s).

Marketing

d. The Real Property will be publicly marketed for at least two weeks, which marketing period may be extended by the Receiver.

e. Each parcel of the Real Property will be separately listed for sale on the Multiple Listing Service ("**MLS**").[30]

f. The listing price for the Farm Parcel will be $11,500,000.

g. The listing price for the Residential Parcel will be $899,000.

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[28] Ibid.

[29] First Supplement, supra note 6, para. 13.

[30] The Receiver has been advised by CBRE that separately listing the Farm Parcel and the Residential Parcel is most likely to maximize value. If a prospective purchaser wishes to purchase all the Real Property, they may make a combined offer for both parcels.

h. On or before the Commencement Date (defined below), CBRE will send its Real Property marketing materials to: (i) CBRE's database of potential purchasers; (ii) owners of the properties in the geographic region surrounding the Real Property; and, (iii) parties who have previously contacted the Receiver directly advising of their interest in purchasing the Real Property.

i. Following the Commencement Date, CBRE, utilizing "Campaign Logic" software, will send a weekly email promoting the Real Property to CBRE's database of potential purchasers.

j. The Brochure will be included in all electronic and hard-copy marketing materials.

k. Marking of the Real Property will include a LinkedIn posting on CBRE profiles that collectively have over 20,000 contacts.

l. A prominent, site-specific, "for sale" sign will be placed on each parcel of the Real Property.

m. CBRE will provide tours of the Real Property to interested prospective purchasers.

n. The Real Property will be marketed on an "as-in, where is" basis.

o. CBRE and Remax will otherwise market the Real Property in accordance with its obligations under the Listing Agreements.

p. Offers for the Real Property must be submitted on a form of agreement of purchase and sale (each a "**Template APS**") to be prepared by the Receiver's counsel and included in the applicable data room by CBRE.

Evaluation and selection of wining offer(s)

q. Offers must be submitted on an updated Template APS and include a redline to the applicable Template APS.

r. The Receiver has final authority to select the winning offer(s), and is not obligated to accept any offer, including the highest offer.

s. Any sale transaction involving the Real Property is conditional upon court approval of the same.

t. The Sale Process milestone dates are summarized in the following table:

Milestone	Deadline
Commencement Date	No later than April 3, 2026.
Marketing Period	A minimum of two weeks from, and including, the Commencement Date, subject to extension by the Receiver in its sole discretion, in consultation with CBRE. If the Receiver determines to extend the Marketing Period, CBRE will provide notice of such extension to all parties who at the time of the extension have obtained access to either data room. During the Marketing Period, the Receiver will not review any offers received; the Receiver will review and evaluate offers on an ongoing basis after the Marketing Period has expired.
Hearing for Approval and Vesting Order	To be determined by the Receiver, acting reasonably, and subject to court availability.

PART III - STATEMENT OF ISSUES

31. There are two issues before this honourable court:

    (a) whether this court should grant the Sale Process Approval Order; and

    (b) whether this court should grant the Ancillary Order.

    The Receiver respectfully submits that the answer to both issues is “yes”.

PART IV - LAW AND ARGUMENT

A. THE SALE PROCES APPROVAL ORDER SHOULD BE GRANTED

32. The Appointment Order, which is based upon the Toronto Commercial List model form of appointment order, empowers and authorizes the Receiver to, without court approval:

> … to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.[31]

33. While the Toronto Commercial List model receivership order provides this power to unilaterally market a debtor's assets, court approval of a comprehensive sale process is often sought to provide certainty and transparency to all stakeholders and the court.

34. This court has jurisdiction to approve a sale process under section 101(2) of the CJA and section 243(1)(c) of the BIA.[32]

35. Justice D.M. Brown (as he then was), has stated that,

> when reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.[33]

36. *The proposed Sale Process is transparent and fair*. The opportunity to purchase the Real Property will be broadly and publicly marketed. Any interested party may make an offer for either, or both, the Farm Parcel and the Residential Parcel. The barriers to making an offer are low: an interested party must only make a confidentiality agreement to access the data room(s) and submit its offer on the Template APS, which will have been prepared by the Receiver's counsel.

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[31] Appointment Order, para. 3(j), Motion Record, Tab 2A.

[32] CJA s. 101(2): a receivership appointment order "may include such terms as are considered just"; BIA s. 243(1)(c): the Court "may appoint a receiver to… take any other action that the Court considers advisable."

[33] *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII), para. 6.

37. *The proposed Sale Process is commercially efficacious*. The Company generates no revenue and is facing regulatory enforcement action. The Receiver therefore has a limited window to sell the Real Property before the value of receivership estate begins to materially erode through care and maintenance costs and potential fines and work orders. The Sale Process mandates a minimum two-week marketing period, which may be extended by the Receiver in its discretion (having the benefit of the advice of CBRE). This approach balances sufficient market exposure of the Real Property against the commercial realities facing the Company and the Receiver.

38. *The Receiver believes that a public sale process for the Real Property will maximize value for the Company's stakeholders*. Given that the Company has no active operations, and the NEC has determined that the businesses of the Company's Commercial Tenants violate the Plan, there is no reasonable alternative to a sale process. While unsolicited offers for the Real Property have been made, none have closed.

B. THE ANCILLARY ORDER SHOULD BE GRANTED

39. The Receiver is seeking, through the Ancillary Order, an order:

(a) directing the Directors and Officers to comply with their obligations under the Appointment Order to inventory and deliver the Company's books and records to the Receiver;

(b) approving the Disclaimer Notices;

(c) directing the removal from the Real Property Vehicles that have been abandoned or whose ownership is unknown;

(d) approving the First Report and First Supplement and the conduct and activities described therein; and

(e) approving the accounts of the Receiver and its legal counsel.

(i) The Directors and Officers should be directed to comply with their obligations

40. Paragraphs 5 and 6 of the Appointment Order require all persons to "forthwith" (a) advise the Receiver of books and records "of any kind related to the business or affairs" of the Company, in that person's possession, power or control and (b) provide such books and records to the Receiver, or permit the Receiver to make copies of same.

41. The evidence before this court is that the Directors and Officers have not met their disclosure obligations under the Appointment Order to the satisfaction of the Receiver.[34]

42. The relevant provisions of the Ancillary Order simply breathe life into the Directors and Officers' existing legal obligations.

(ii) The Disclaimer Notices should be approved

43. It is well-established in law that a receiver is not bound to perform the contracts of an insolvent debtor.[35] This common law paradigm is reflected in the Toronto Commercial List model form of appointment order, which provides in paragraph 3(c) that the Receiver is empowered and authorized to "cease to perform any contracts of the Debtor". While the commentators Bish and Noel note that the right to cease performing contracts is not a right of "disclaimer" *per se*, which is a statutory remedy that provides insolvent *debtors* attempting to restructure their businesses with a mechanism to "walk away" from unfavourable contracts, insolvency practitioners and the courts (including the Supreme

[34] First Report, supra note 3, para. 20.

[35] David Bish and Mike Noel (Torys LLP), *The Treatment of Contracts Under Insolvency Law*, Insolvency Institute of Canada (Articles), IIC-ART Vol. 12-9, pp. 5-7.

Court of Canada) almost invariably use the term "disclaimer" when referring to a *receiver's* rejection of any contract of the insolvent debtor (including leases).[36]

44. The Receiver's jurisdiction to reject contracts is grounded in section 243(1) of the BIA, pursuant to which, *inter alia*, the Appointment Order was made; this section provides the court with the authority to give the receiver the authority to take "any action the court considers advisable".

45. When a court is asked to approve a disclaimer proposed by a Receiver, the fundamental inquiry is whether a balancing of the equities support the proposed disclaimer.[37]

46. In the recent decision of *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al*, Justice Peter J. Osborne (as he then was), described the criteria that assist a court with its inquiry into the equities of a disclaimer of a contract by a receiver:

(a) the respective legal priorities of the competing interests;

(b) whether the disclaimer would enhance the value of the assets, and if so, would a failure to disclaim amount to a preference in favour of a particular party; and

(c) whether, if a preference would arise, the party seeking to avoid the disclaimer has established that the equities support such a preference.[38]

47. These factors demonstrate that the Disclaimer Notices should be enforced:

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[36] Ibid.

[37] *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 (CanLII) [*Romspen*], para. 31-33; *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONSC 5071 (CanLII), para. 29 and 31-51; *Bank of Montreal v Smith*, 2021 SKQB 47 (CanLII), para. 19 and 20.

[38] *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al.*, 2024 ONSC 6205 (CanLII), para. 26.

(a) The Receiver was appointed pursuant to the application of FCC, the Company's first mortgagee. The Receiver's sale of the Real Property is necessary to allow FCC to realize on its priority interest in the Real Property. As a matter of law, a first mortgagee has legal priority over the interests, if any, of an unregistered lessee.[39]

(b) The evidence before this court it that enforcing the Disclaimer Notices would enhance the market value of the Real Property. Further, enforcing the Disclaimer Notices will mitigate the risk of costs related to potential regulatory enforcement action by the NEC.

(c) In this case, the equities strongly favor enforcing the Disclaimer Notices. Justice Wilton-Siegel has noted that "a receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party".[40] Failure to enforce the Disclaimer Notices will create a significant preference in favor of the Commercial Tenants, at the expense of FCC: the Commercial Tenants are not paying rent, their use of the property violates the Plan, and their tenancy will likely depress the market value of the Real Property; there is no basis upon which they should be entitled to remain on the Real Property. Further, despite having notice of FCC's application to appoint the Receiver, none of the Commercial Tenants opposed paragraph 3(c) the Appointment Order.

(iii) The removal of abandoned vehicles and equipment should be directed

48. The Receiver seeks an order (a) directing the Commercial Tenants to remove their equipment, vehicles and related accessories from the Real Property, failing which the Receiver may do so; and

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[39] *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 (CanLII), at para. 27; *Land Titles Act*, RSO 1990, c L.5, s. 93(3).

[40] *Romspen, supra*, para. 31.

(b) directing the removal of equipment, vehicles and related accessories whose ownership is unknown.

49. In any future scenario, vehicles unrelated to permitted uses of the Real Property must be removed. If the Disclaimer Notices are enforced, it is axiomatic that the Commercial Tenants must remove their personal property. However, even if the Disclaimer Notices are not enforced (or not enforced within the timeframe proposed by the Receiver), the NEC has demanded the removal of the Vehicles from the Real Property by no later than March 31, 2026.

50. Further, the Receiver has been advised by its proposed contractor for the removal of Vehicles that it will not remove Vehicles of unknown ownership unless either: (i) ownership is clearly established; or (ii) the court issues an order authorizing the Receiver to remove, transport, and store the vehicles.

(iv) The First Report and the conduct and activities of the Receiver described therein should be approved

51. In *Target Canada Co., Re*, Morawetz, RSJ (as he then was) stated that a request to approve a Monitor's report "is not unusual"[41] and that "there are good policy and practical reasons" to do so; a motion to approve a Monitor's report achieves the following policy and practical objectives:

(a) brings the Monitor's activities before the court;

(b) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;

(c) enables the court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

[41] *Target Canada Co. (Re)*, 2015 ONSC 7574 [*Target*]; *Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161 para. 15 [*Hanfeng*].

(d) provides protection for the Monitor not otherwise provided by the CCAA; and

(e) protects the creditors from the delay and distribution that would be caused by re-litigation of steps previously taken and indemnity claims.

52. In *Hangfeng Evergreen Inc., Re*, Myers J., held that the same policy and practical considerations apply when considering approval of a receiver's conduct.[42]

53. The Receiver submits that it is appropriate to approve the First Report and the First Supplement, and the conduct described therein. The Receiver has acted responsibly and carried out its activities in a manner consistent with the provisions of the Appointment Order. No party opposes approval of the First Report and the First Supplement and the conduct described therein.

(v) The accounts of the Receiver and Miller Thomson should be approved

54. Pursuant to paragraph 18 of the Appointment Order, the Receiver and its legal counsel are to be paid their reasonable fees and disbursements at their standard rates and charges, incurred both before and after the making of the Appointment Order. Pursuant to paragraph 19 of the Appointment Order, the Receiver and its counsel are required to pass their accounts.

55. In approving the accounts of the Receiver and its legal counsel, the compensation sought must be fair and reasonable having regard to all relevant factors including but not limited to the following:

(a) the nature, extent and value of the assets;

(b) the complications and difficulties encountered;

[42] *Target*, *supra* note 17; *Hanfeng*, *supra* note 17, at para 15; *Laurentian University of Sudbury*, 2022 ONSC 5850.

(c) the degree of assistance provided by the debtor;

(d) the time spent;

(e) the receiver's knowledge, experience and skill;

(f) the diligence and thoroughness displayed;

(g) the responsibilities assumed;

(h) he results of the receiver's efforts; and

(i) the cost of comparable services when performed in a prudent and economical manner.[43]

56. In *Laurentian University*, Chief Justice Morawetz held that the role of the court on a motion to pass accounts in to evaluate them on based on the "overriding principle of reasonableness." The overall value of the services provided is the predominant consideration in assessing the reasonableness of the accounts. The court does not engage in a docket-by-docket assessment of the accounts, as minute details of each element of the professional services may not be instructive when viewed in isolation. The focus on the fair and reasonable assessment should be on what was accomplished.[44]

57. The Receiver seeks approval of the Professionals' Fees as set out in the fee affidavits appended to the First Report.

58. The Receiver's fees are $99,740.29 and Miller Thomson's fees are $31,254.15 (in each case, inclusive of all applicable disbursements and taxes).[45]

[43] *Bank of Nova Scotia v Diemer*, 2014 ONCA 851, para. 33.
[44] *Laurentian University*, *Re*, Endorsement dated May 18, 2022 (2022 ONSC 2927), para. 9.
[45] First Report, supra note 3, paras. 63 and 65.

59. The Receiver respectfully submits that the Professionals' Fees are fair and reasonable, in accordance with the standards established in *Diemer* and *Laurentian University*. The Professionals' Fees: (a) were incurred at comparable and competitive rates that reflect the appropriate responsibility, scope, and complexity of the case; (b) are reasonable given the scope of work involved; and (c) were necessary and consistent with the Receiver's duties under the Appointment Order.[46]

60. The First Report describes what was accomplished by the Receiver and Miller Thomson during the work period covered by the fee affidavits (from August 22, 2025 through to December 31, 2025 and July 8, 2025 through December 31, 2025, respectively). In summary, amongst other things: the Receiver took possession of the Company's business and Real Property; evaluated and retained a property manager; liaised with the NEC; engaged with the Directors and Officers and the Commercial Tenants regarding the various matters described in the First Report; obtained an appraisal of the Real Property; negotiated with unsolicited offerors for the Real Property; evaluated and retained professional real estate advisors; designed the Sale Process; and prepared the First Report and the Supplemental Report.[47]

PART V - ORDERS REQUESTED

61. For the reasons set out herein, the Receiver requests this court grant the Sale Process Approval Order and the Ancillary Order substantially in the forms in the Supplemental Motion Record.

[46] First Report, *supra* note 3, para. 66.
[47] First Report, *supra* note 3, para. 16.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2026.

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SCHEDULE "A"
LIST OF AUTHORITIES
(In order of appearance)

Jurisprudence

1. *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375
2. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750
3. *Romspen Investment Corporation v Horseshoe Valley Lands Ltd.,* 2017 ONSC 426
4. *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONSC 5071
5. *Bank of Montreal v Smith*, 2021 SKQB 47
6. *KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al.*, 2024 ONSC 6205
7. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816
8. *Target Canada Co. (Re)*, 2015 ONSC 7574
9. *Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161
10. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851
11. *Laurentian University of Sudbury*, 2022 ONSC 5850
12. *Laurentian University, Re*, Endorsement dated May 18, 2022, 2022 ONSC 2927 [Not available on CanLII. Available on the Monitor's website as Court Order #20]

Secondary sources

1. David Bish and Mike Noel (Torys LLP), *The Treatment of Contracts Under Insolvency Law*, Insolvency Institute of Canada (Articles), IIC-ART Vol. 12-9 [appended hereto at Schedule "C"]

I certify that I am satisfied as to the authenticity of every authority.

March 5, 2026
Date

patrick corney
Signature

SCHEDULE "B"
RELEVANT STATUES

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

***Courts of Justice Act*, RSO 1990, c C.43**

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

***Land Titles Act*, RSO 1990, c L.5**

Effect of charge when registered

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

SCHEDULE "C"
SECONDARY SOURCES

See attached

IIC-ART Vol. 12-9
Insolvency Institute of Canada (Articles)

— The Treatment of Contracts Under Insolvency Law

——David Bish and Mike Noel [*]

INTRODUCTION

A staple of insolvency practice consists of explaining to clients — with any number of caveats, qualifications, and vagaries — how contracts might potentially be treated in the course of insolvency proceedings. Can an insolvent person cease performing its contract? Can rights of termination upon insolvency be exercised? Does the trustee or receiver step into the contractual shoes of the debtor? Is a right of first refusal or option still binding? Can a royalty agreement be eliminated from title to real property? Is a contractually-required consent to an assignment or change of control enforceable? Are provisions providing for arbitration or set off or any number of other things still operative? There are endless permutations of this exercise, but at its core it is always the same: how insolvency law affects the enforcement of otherwise valid contracts.

Contracting parties should generally have some measure of certainty at the time they enter into a contract as to how that contract — and their respective rights and remedies thereunder — may be treated in the course of insolvency proceedings. And to that end, the courts should apply consistent approaches and outcomes in resolving disputes over the treatment of contracts. Commercial efficacy is dependent upon a stable and predictable legal paradigm that permits parties to structure their contractual affairs accordingly. The purpose of this article is to provide a cursory framework in which to make sense of the ways in which contracts may or may not be enforced during insolvency proceedings, with a view to establishing some measure of both consistency and transparency, and — as a result — the predictability that is so highly valued by insolvent persons and stakeholders alike.

This article proceeds in five parts. First, it frames the discussion with an overview of the importance of contractual integrity. Second, it identifies that the treatment of contracts may vary based on the various forms of insolvency proceedings in which contractual counterparties may find themselves. Third, it describes the ways that a contract can be brought to its end in its entirety pursuant to insolvency law. Fourth, it categorizes the various scenarios where courts will refuse to enforce specific provisions of an otherwise enforceable contract and provides common examples where such provisions were found to be inoperative. Finally, it canvasses instances where courts refused to override contracts, instead choosing to enforce them in accordance with their terms.

1. PREAMBLE: WHY CONTRACTS MATTER

At the core of legal paradigms in all corners of the globe — past and present — are two prevailing and related foundational principles: freedom of contract and the sanctity of contract. *Pacta sunt servando* (agreements must be kept) is a brocard, an organizing principle not just of law but of society. These principles embrace and reflect deeply held moral and ethical convictions, and their history in English law is evident in reported cases as far back as the 17th century. [1] We expect people to honour their word and to act honestly and in good faith; all the more so where promises are formally reduced to writing and relied upon.

As a general matter of contract law, contracts are enforceable in accordance with their terms where:

(i) the requisite elements of a contract are present (*i.e.*, intention and mutuality, offer and acceptance, certainty of terms, adequate consideration, legality of the contract, and capacity of the parties); and

(ii) there is no defence or excuse to justify non-performance of the agreement (*e.g.*, duress, mistake, misrepresentation, etc.).

Over time, the sanctity of contract has been qualified and encroached through the incremental development of contract law — not insolvency law — as a result of the conscientious proliferation of numerous doctrines and defences to strict enforceability, including those relating to forfeiture, penalties, equitable relief, mistake, frustration, duress, principles and practices of interpretation, unjust enrichment, and public policy.

Even so, it remains true that breach of contract fundamentally offends morality generally and commercial fairness specifically, and this view persists due to significant historical, commercial, economic, and equitable rationales. It is in keeping with these views that the Supreme Court of Canada has had much to say about good faith as an organizing principle in matters of contractual performance. [2] Barring exceptional circumstances, Canadian law embraces as axiomatic principles of party autonomy, freedom of contract, holding parties to their bargains, and the courts' unwillingness to write or re-write contracts for the parties or to relieve parties from their contractual obligations.

As with so many other legal paradigms, our understanding of the enforceability of contracts is decidedly more uncertain when those legal principles established under contract law collide with insolvency law. It is doubly problematic in that not only may contracts that are otherwise enforceable not be enforced in insolvency, but also that there is seemingly a lack of clarity as to whether and in what circumstances contracts will be enforced. In some cases, contracts may be ended in their entirety, while in other cases a contract may continue to bind the parties despite being stayed or disregarded in part — whether temporarily or permanently. The result is an often-confusing patchwork of cases in which contracts — and the rights of the parties to such contracts — may seem to be treated capriciously and with the intention of achieving a desired commercial outcome (*i.e.*, advancing the interests of an insolvent debtor or a particular creditor) rather than with an even-handed application of established principles and practices.

2. THE CHALLENGE OF DISPARATE INSOLVENCY PROCEEDINGS

Before addressing the treatment of contracts under insolvency law, it is important to appreciate that there are a variety of bankruptcy and insolvency scenarios in which insolvency law applies, and that the treatment of contracts and the rights of contractual counterparties may vary from one scenario to another. The most common scenarios for a large corporate entity include:

(a) liquidation in bankruptcy under the *Bankruptcy and Insolvency Act* [3] [BIA] or under the *Winding-up and Restructuring Act* [4] [WURA];

(b) restructuring proceedings under the BIA's proposal provisions or under the *Companies' Creditors Arrangement Act* [5] [CCAA];

(c) a going concern sale under the BIA's proposal provisions or under the CCAA;

(d) liquidation or a going concern sale in receivership proceedings under the BIA and/or other statutes providing for the appointment of a receiver; and

(e) a corporate reorganization under the *Canada Business Corporations Act* [6] [CBCA] or a provincial equivalent.

If bankrupt or insolvent, a corporate entity would likely have the ability in any of these scenarios to temporarily stay the exercise of contractual rights and remedies by its contractual counterparties. And in all but a CBCA proceeding, an insolvent person could disclaim, repudiate or resiliate (but not terminate) such of its contracts as it elects, subject to complying with applicable legal requirements in so doing, as discussed further below. However, beyond these common outcomes, there may be considerable variance in how contracts are treated based on what type of insolvency proceeding is engaged. CCAA and receivership proceedings predicated on far-reaching court orders may impact contracts and contractual rights far more aggressively that BIA bankruptcy or proposal proceedings predicated on statutory codification.

Inevitably, predictability and consistency of treatment for contracting parties is impaired — perhaps unjustifiably — by differential treatment of contracts that arises simply because an insolvent person or enforcing creditor chooses one type of insolvency proceeding over another. For example, the treatment of a commercial lease and the rights of a landlord against an insolvent tenant vary significantly depending upon the type of insolvency proceeding. Where that lease contract is rejected by an insolvent tenant, a landlord with a resulting claim for damages may be: (i) permitted only a preferred claim of 3 months' arrears and 3 months' accelerated rent where the lease so provides in a bankruptcy; (ii) restricted in its claims for rent based on a statutory formula in a proposal under the BIA; or (iii) awarded a claim for its full damages for lost rent, subject to principles of mitigation, in CCAA proceedings. The end result is that contracting parties face considerable uncertainty at the time they enter into their contracts simply because they do not know which type of insolvency proceeding might be invoked in the future; their positions may vary significantly according to the proceeding ultimately selected.

3. BRINGING CONTRACTS TO AN END IN THEIR ENTIRETY PURSUANT TO INSOLVENCY LAW

A contract may potentially be ended in its entirety by an insolvent debtor or its court-appointed officer in one of five principal ways:

(i) recission;

(ii) disclaimer (or resiliation, its functional equivalent in Quebec) [7] by debtors in possession;

(iii) repudiation;

(iv) rejection of contracts by court officers; or

(v) termination.

As a preliminary note, it is troublesome that we continue to confuse and conflate these concepts and to use these terms and concepts interchangeably (as well as to imprecisely use supposed synonymous terms such as abandon, reject, quit, cease to perform, surrender, and the like). It makes a mess of things. This unfortunate state of affairs is in large measure due to a persistent singular view of the final outcome for a contract in insolvency, irrespective of the legal doctrines and terminology engaged; namely, that a debtor or its court officer may cease performing a contract in its entirety and the counterparty is awarded a claim for its damages as a result.

(a) Recission

Recission may be available to end a contract in its entirety, but this remedy is not specific to insolvency or the rights of an insolvent person under insolvency law. Rather, rescission is an equitable remedy that permits a court to find a contract void *ab initio* (*i.e.*, ineffective from its inception), thereby treating the contract as essentially canceled. [8] Rescission generally requires a counterparty to establish one or more vitiating factors, such as misrepresentation, mistake, duress, or undue influence. [9] It is a defence to compelled performance of a contract, and where successfully engaged it does not give rise to a damages claim by the counterparty against the party initiating recission. While contracting parties may seek to rescind their contracts in insolvency proceedings (subject to applicable stays of proceedings), the remedy is fundamentally a matter of contract law, not insolvency law.

(b) Disclaimer by Debtors in Possession

The most commonly engaged means of ending a contract in insolvency proceedings is disclaimer. Disclaimer is a statutory remedy that provides insolvent debtors attempting to restructure their businesses with a mechanism to "walk away" from unfavourable contracts, thereby improving their balance sheets or operations or otherwise facilitating a restructuring. Insolvent debtors in BIA proposal proceedings are given the general right to disclaim their agreements under section 65.11 of the BIA,

and the specific right of insolvent tenants (but not insolvent landlords) to disclaim commercial leases under section 65.2(1). [10] Similarly, insolvent debtors in CCAA proceedings have rights to disclaim agreements under section 32(1) of the CCAA. [11]

The BIA and CCAA both require the debtor to take a positive and express act in order to disclaim an agreement, such as sending the counterparty a written notice of disclaimer in a prescribed form or applying to court on notice to the counterparty to the agreement. [12] Absent such an act, courts should not lightly infer disclaimer. [13] Disclaimer is also subject to certain procedural requirements (for example, 30 days' prescribed notice in the case of commercial leases disclaimed under the BIA). [14] Disclaiming a contract in its entirety is a serious matter not to be undertaken unnecessarily or for an improper purpose; accordingly, both the BIA and CCAA expressly require that the debtor obtain the approval of either the court or the court-appointed officer (*i.e.*, the proposal trustee or the monitor), and the counterparty to the contract is entitled to be provided with the insolvent debtor's reasons for disclaimer. [15]

Additionally, the solvent counterparty has the statutory right to apply to court for an order that the agreement is not to be disclaimed, [16] and the factors the court is to consider in deciding whether to order disclaimer are prescribed, thereby circumscribing the court's jurisdiction. [17] The BIA and CCAA also contain express statutory limitations on disclaimer; in particular: (i) protections for licensees of intellectual property to continue to use the intellectual property notwithstanding disclaimer; [18] and (ii) identification of types of contracts that cannot be disclaimed; namely, eligible financial contracts, collective agreements, financing agreements where the insolvent debtor is a borrower, and real property leases where the insolvent debtor is the landlord. [19]

The concept of disclaimer is fundamentally underpinned by a *quid pro quo*: the insolvent debtor is afforded additional flexibility to restructure its affairs and turn its business around, and the solvent counterparty is entitled to prove its claim for damages resulting from the disclaimer (which claims are expressly recognized and preserved under the BIA, CCAA, and certain other legislation). [20] This preservation of damages claims is critical. Where disclaimer is statutorily permitted, it is by definition a lawful act, and, without a corresponding statutory claim being awarded, there would otherwise be no resulting claim by virtue of the debtor having exercised a lawful statutory right. The statutory preservation of a claim in the face of disclaimer is indicative of Parliament's intention that otherwise wrongful conduct (*i.e.*, the refusal to perform a binding contract) not be negated or sanctioned so as to relieve the party that is disclaiming a contract from the consequences of its having harmed its counterparty. Disclaimer only ends the insolvency contracting party's obligations; all collateral claims, including guarantees and indemnities, continue to be enforceable. [21]

In line with this reasoning, both the BIA and CCAA indicate that where a debtor attempts to disclaim a contract but such disclaimer is contested, the court is not called upon to merely approve or affirm the debtor's disclaimer. [22] Rather, the court is to make its own order to disclaim the contract if appropriate, and it is from this order that the disclaimer emanates in such circumstances. Such order is of course lawful, but a right to claim damages is statutorily preserved.

Only an executory contract — that is, one that has not been fully performed by the insolvent debtor — should be subject to potential disclaimer. [23] A grant of rights that is no longer executory cannot be disclaimed (for example, where the contract grants an immediate interest in real property, discussed below). [24] Disclaimer is first and foremost a means for an insolvent debtor to cease performing a contract where such performance is unduly onerous and to deal with the consequences of such non-performance in its insolvency proceedings. [25] It is not a means to confiscate the property or interests of counterparties or to reverse transactions previously completed. Disclaimer is fundamentally a shield against a counterparty insisting on specific performance of a contract and the remedies that would otherwise be available from non-performance; it is not a sword with which to attack the rights and interests of such counterparty. Although disclaimer is commonly exercised, it is an extraordinary remedy insofar as it permits a contracting party to negate its bargain — something contract law does not take lightly.

Given that there is no common law right of disclaimer, [26] an insolvent person should not purport to disclaim a contract in the absence of a statutory right and corresponding preservation of damages claim (as well as all of the other statutory rules and protections surrounding disclaimer noted above, none of which are found in the common law). In the absence of a statutory right to disclaim, the parties should instead purport to repudiate a contract and engage applicable law of repudiation, or — in the case of a court officer such as a trustee in bankruptcy or receiver — recourse should be had to other doctrines by which contracts may be rejected by such parties (*i.e.*, which doctrines are distinct from disclaimer).

(c) Repudiation

In contrast to disclaimer, a refusal to perform a contract by an insolvent person where there is no such statutory right amounts instead to a repudiation of the contract. Repudiation occurs when one party to a contract breaches the contract in such a way as to deprive the non-defaulting party of substantially all of the benefit of the contract, and, accordingly, anticipatory repudiation occurs where one party to a contract acts in a way that evidences its intention to no longer be bound by the contract or perform its obligations thereunder (*e.g.*, by providing notice of same to the other counterparty). [27]

There is a significant body of law on repudiation generally and on the right of counterparties in response to repudiation. [28] It is an amorphous doctrine, and not strictly synonymous with breach or anticipatory breach (*i.e.*, a "classic" breach of contract refers to failing to comply with the specific terms of the contract, whereas repudiatory breach refers to a "breach" arising under common law where one party indicates it will cease complying with the contract in its entirety or substantially its entirety — in contrast, a party that repudiates a contract may not yet have breached any specific provision of the contract). Where repudiation occurs, the counterparty has the right at law to elect its response, including an established right to refuse the repudiation and to insist on performance of the contract. [29]

As a matter of common law, repudiation amounts to an attempt to escape a contract, but that result is not guaranteed. Whereas disclaimer ends a contract, repudiation merely confers on the innocent party the right to elect from various remedies available to it. In cases of insolvency, it is customary for a solvent counterparty to accept the repudiation and assert a claim for damages — in large measure because there is little point in attempting to compel an insolvent party to perform a contract where its insolvency makes continued performance either impossible or impractical. [30] The doctrine of repudiation — with its right to elect responding remedies by the counterparty — is unwieldy and impractical in insolvency law.

Although there is no statutory right to repudiate found in insolvency legislation, some court orders may be drafted so as to purport to bestow on an insolvent person (or its trustee or receiver) a supposed right or authority to repudiate contracts. [31] This is problematic for many reasons, including: (i) because no person has a right to behave unlawfully and no court ought to purport to authorize unlawful conduct; and (ii) such orders frequently fail to establish any further parameters such as those statutorily set out for disclaimer (*e.g.*, the right to claim for damages, notice requirements, the right to contest the repudiation, requirements for court officer approval or court approval, limitations on the types of contracts that may be repudiated, etc.). An open-ended and unqualified court-ordered "right" to repudiate contracts without all of the equivalent statutory mechanics provided for in respect of disclaimer is highly troublesome.

As a result of the evolution of disclaimer, it is doubtful that there is any utility in preserving a doctrine of repudiation in most insolvency proceedings. Or, put another way, it should be unnecessary for an insolvent debtor to repudiate contracts given the carefully enumerated statutory paradigm for disclaimer. It is difficult to conceive of an instance in which an insolvent debtor acting in good faith would prefer repudiation to disclaimer, or would not have disclaimer available to it and therefore need to rely on repudiation.

(d) Rejection of Contracts by Court Officers

Bankruptcy does not result in an automatic cessation of contracts; rather, contracts are held in abeyance for a short period of time while a trustee determines whether to elect to adopt and perform (or sell or assign) or to reject such contracts. If a trustee

does not elect to adopt a contract within a reasonable time — *e.g.*, by the first meeting of creditors — then the counterparty may treat the contract as broken. [32] There is a similar common law regime for court-appointed receivers.

This long-established common law paradigm is deeply embedded in insolvency law. [33] As a result, court-appointed officers such as trustees and receivers should have little or no need for doctrines of disclaimer and repudiation.

Court officers are typically not obligated to continue to carry on the business of the debtor and are permitted to cease to perform the debtor's contracts, [34] whether by express statutory authority [35] or pursuant to court order (for example, the Ontario Model Receivership Order illustrates how this power is conferred upon receivers). [36] In practice, a trustee or receiver typically elects to cease to perform contracts of the bankrupt or insolvent debtor and may provide notice of same, and the counterparty thereafter asserts a common law claim for damages arising therefrom (*i.e.*, not a statutory damages claim, as is the case with disclaimers).

Authority to cease to carry on a business or to cease performing contracts are *not* rights of disclaimer. Where Parliament intends disclaimer in the BIA and CCAA, it uses that language. Trustees have limited express statutory powers to disclaim commercial leases, [37] but these express rights of disclaimer are in addition to their general authority to retain or reject contracts. A trustee's entitlement to disclaim commercial leases may be conferred not only in the BIA but also by provincial statute (in Ontario, such right of disclaimer is found in the *Commercial Tenancies Act*). [38] Although there is an established practice of disclaiming real property leases given the express statutory provisions on point, its origins have a long and tortuous history. There is no express statutory authority for trustees and receivers to disclaim contracts generally, and the provisions providing specific rights of disclaimer for leases would be unnecessary if the statutes otherwise provided rights of disclaimer for contracts generally.

Additionally, disclaimer and repudiation only extend to contracts that bind a party and which that party no longer intends to perform. Because a court officer is generally not bound to perform an executory contract of the bankrupt or insolvent debtor, it should be unnecessary for a trustee or receiver to disclaim or purport to repudiate a contract. Since a trustee or receiver is not bound by a bankrupt or insolvent person's contracts, it need not escape those obligation through disclaimer or repudiation.

A trustee or receiver would not purport to adopt or reject a contract that is not an executory contract. Where there are no remaining obligations to perform, there is, tautologically, no need for a trustee or receiver to determine whether or not to perform obligations.

Notwithstanding that trustees and receivers reject contracts rather than disclaim them, there is a long history of referring to a trustee's or receiver's rejection not only of leases but of any contract of the insolvent person as being a form of disclaimer and/or repudiation. [39] This unfortunate practice of conflating these doctrines persists. In the Supreme Court of Canada's decision in *Peace River Hydro Partners v. Petrowest Corp.*, [40] the Court repeatedly confused a receiver's court-ordered authority to cease performing contracts of the debtor (which is itself merely an abstraction from the common law) with the doctrine of disclaimer, and further confused that doctrine (including findings by a concurring minority that: (i) contracts that are not executory are nonetheless still subject to disclaimer; (ii) portions of a contract may be disclaimed rather than the entirety of the contract only; and (iii) that no express act of disclaimer is required by a receiver and that conduct of a receiver alone may amount to a disclaimer — all of which are categorically incorrect). [41]

Furthermore, where there is statutory codification of disclaimer in the BIA and CCAA, Parliament has set out the rules of the game: requisite notice, safeguards such as court approval or court officer approval, rights to dispute the disclaimer and to obtain reasons for the disclaimer, strict criteria that a court must consider in deciding whether to make an order of disclaimer, and preservation of claims for damages. But there are no such protections or due process where disclaimer is purportedly invoked or inferred by a trustee in bankruptcy or receiver. A court order that grants a receiver the right to cease performing the debtor's contracts is not a grant of a right of disclaimer, and such an order contains none of the statutory safeguards surrounding disclaimer. Such orders merely confirm the receiver's common law right to adopt or reject the debtor's contracts, not establish a judicial disclaimer regime founded in the court's statutory jurisdiction. Nonetheless, where such rejections of contract are

erroneously characterized as disclaimers, case law has attempted to hold it all together by preserving resulting claims for damages. [42]

Note also that the WURA severely limits the circumstances in which the business of the insolvent person may be continued, [43] such that the performance of most or all executory contracts ceases unless sold or assigned to purchasers as part of the winding-up of the debtor. The WURA contains no express statutory right to disclaim contracts and repudiation of contracts should also be an unnecessary concept in winding-ups. A liquidator ostensibly has similar common law authority to that of a trustee or receiver in electing to retain or reject contracts of the insolvent debtor, and that authority may be further bolstered through the court order appointing the liquidator (*i.e.*, akin to receivership orders in this respect). [44] Because the contractual obligations of the debtor do not bind a liquidator in the sense of compelling continued performance of the contract, the liquidator has no need of disclaimer or repudiation to escape the contract. And again, the WURA contains none of the statutory protections that are established for disclaimer under the BIA and the CCAA.

(e) Termination

Termination is a fifth — and conceptually distinct — legal scenario, in which a party relies on a right to bring a contract to an end in accordance with its terms. Termination is the exercise of a contractual right to which the terminating party is entitled, and because no person is wronged by the act of termination, there is no injury suffered by the other party entitling it to damages. In other words, the contract has been ended lawfully. The word "termination" should never be used to describe a situation in which the ending of a contract results in a corresponding claim for damages — the two concepts are mutually exclusive. [45]

If an insolvent person or its trustee or receiver has a contractual right of termination, it is generally free to exercise such right in accordance with the terms of the contract. However, a court cannot grant a right of termination where it does not already exist contractually. In contrast, rights of termination by a contract counterparty are typically stayed (but not invalidated) in most insolvency proceedings.

4. OVERRIDING PORTIONS OF A CONTRACT PURSUANT TO INSOLVENCY LAW

Although there is much confusion in the use of terminology, it is well-established that a contract may be avoided in its entirety by an insolvent person or its court-appointed representative in most insolvency scenarios. Where an insolvent person finds an executory contract to be unduly onerous, Parliament or the common law has provided an extraordinary remedy to facilitate restructuring or value maximization: bringing the contract in its entirety to a premature conclusion. However, neither Parliament nor the common law has not provided a second, alternative remedy of simply negating only that portion of the contract that the insolvent person finds burdensome. Many creative lawyers have wished otherwise and sought to overcome it.

It may therefore be unclear whether and in what circumstances select portions of a contract may be avoided while otherwise preserving the balance of the contract. As a starting point, the law generally requires that a contract be kept or rejected in its entirety — a person cannot unilaterally pick and choose parts of a contract to keep and parts to reject, while still binding its counterparty to perform the unilaterally reconstructed contract. For example, it is not possible to disclaim some but not all of a contract. [46] For this reason, an insolvent person is compelled to continue to perform its "go forward" obligations under a contract during its insolvency proceedings if it wishes to maintain the contract and bind its counterparty to continued performance (and even though the debtor's pre-filing defaults — including monetary defaults — are stayed from being acted upon). [47] Continued performance is the *quid pro quo* for maintaining contracts through insolvency while using statutes and courts to stay counterparties from exercising rights in respect of preinsolvency events.

It would also violate basic principles of contract law and fairness to permit an insolvent party (or its trustee or receiver) to selectively enforce a contract or portions of a contract for its benefit while avoiding the burdens of that same contract. [48] An insolvent debtor should do as little violence to its contracts as is necessitated by its circumstances. As once noted by

Farley J.: "the grant of CCAA protection to an insolvent company is not a carte blanche for that company to indiscriminately, unintelligently, and unthinkingly proceed unnecessarily and unreasonably to subject pain and suffering on others." [49]

It is imperative to distinguish between a clause that is not enforceable in insolvency (which happens frequently) and one that is enforceable but unilaterally ignored simply because the insolvent debtor derives some benefit from ignoring it (which rarely occurs — and arguably should never occur). A debtor should not be permitted to arbitrarily elect not to perform parts of a contract that are otherwise enforceable in insolvency: this amounts to the selective unilateral re-writing of a contract and its being imposed on a counterparty, which should not occur. It remains far preferable to characterize troublesome contractual provisions as unenforceable in insolvency rather than intentionally breached at the behest or with the approval of the court. Where portions of a contract have been held to be unenforceable in insolvency, it is based on fundamental concerns and principles, and not simply the strident opportunism of an insolvent person or a significant stakeholder (*e.g.*, a secured lender, purchaser, etc.).

Where a contractual provision is not enforceable, there is no resulting claim for damages. No wrong has been done by the insolvent person for which damages ought to be awarded. In contrast, if an insolvent debtor was simply seeking to avoid performing an otherwise enforceable obligation, the counterparty should be permitted a claim for damages — in much the same way that a counterparty has a damages claim where the entirety of an otherwise enforceable contract is rejected, disclaimed, or repudiated.

Although there are outlier cases that confuse matters, it may generally be observed that the circumstances in which a bankruptcy or insolvency court will not enforce a specific provision found within an otherwise binding and enforceable contract consist of four scenarios:

(i) where there is a conflict with insolvency statutes;

(ii) where there is a conflict with a court order;

(iii) where enforcement of the contractual provision in question is contrary to public policy; and

(iv) where the enforcement of the contractual provision in question conflicts or is otherwise inconsistent with the court's broad statutory or inherent jurisdiction in insolvency.

Each of these scenarios is discussed in turn.

(a) Conflicts with Insolvency Statute

In rare instances, insolvency statutes may expressly identify contractual rights that the courts may not interfere with. For example, the CCAA precludes a stay in favour of a person obligated under a letter of credit or guarantee in relation to the insolvent company. [50] However, since the courts are predisposed to respect contractual bargains between parties, it is more common for insolvency statutes to expressly identify instances in which contractual provisions may be ignored rather than those in which they must be respected. [51]

There are two variations of this outcome: (i) automatic outcomes, in which every such contractual clause is stayed or rendered unenforceable by operation of statute, without need for any further exercise of discretion by the courts; and (ii) discretionary outcomes, in which there is a statutory discretion afforded to the courts, which must then determine whether to stay or negate the contractual provision in question (often based on the courts' application of a statutory test or consideration of statutorily-enumerated criteria).

Contractual provisions that are automatically negated by statute in every instance in which they arise include:

• *Ipso Facto Clauses*. Contractual clauses that purport to impose a consequence that is triggered by reason of a counterparty's insolvency, known as *ipso facto* clauses, are expressly precluded from being effective under both the BIA and CCAA. [52] For example, a clause that purports to amend or terminate the agreement, render non-payable the pre-

filing obligations of the non-insolvent counterparty, or net or set off the parties' obligations because one counterparty commenced insolvency proceedings is of no force or effect. However, the BIA and CCAA both expressly carve out eligible financial contracts from these rules. [53] Also, the BIA provision applies only to restructuring proposals and does not address bankruptcy or receivership proceedings (although common law principles still apply in such cases and may see a similar result).

• *Termination or Amendment*. The BIA and CCAA prohibit a person from terminating or amending an agreement or claiming an accelerated payment or forfeiture under an agreement with a bankrupt individual by reason only of the individual's bankruptcy or insolvency (or, in the case of a lease or a public utilities contract, by reason of non-payment prior to the bankruptcy). [54] These provisions further expressly override any provision in an agreement that purports to violate or side-step these prohibitions. [55] Again, eligible financial contracts are expressly carved out from this prohibition. [56] There are also express limitations that make clear that these clauses' negation does not prohibit a person from requiring payments in cash for goods, services, use of leased property, or other valuable consideration provided after the time of the bankruptcy, or otherwise requiring the further advance of money or credit. [57] Finally, there are special exceptions for aircraft objects that preserve termination and repossession rights. [58]

• *Sale of Assets*. Both the BIA and CCAA permit a sale of the debtor's assets without obtaining shareholder consent and expressly override any contractual consent requirements (such as those typically found in unanimous shareholders agreements). [59] By implication, these provisions also permit sales that are otherwise contractually prohibited (for example, by negative covenants in credit agreements).

• *Contractual Damages*. A contractual claim for damages cannot be pursued by a counterparty against a debtor where the damages provided under the contract conflict with the value assigned to such claim at law. For example, if a landlord's lease is disclaimed by a trustee, it cannot claim contractual damages for unpaid rent beyond the limits prescribed by the applicable statutory disclaimer framework. [60] Additionally, claims for interest at a rate equal to or above the criminal rate of interest [61] or that violate the "interest stops" rule [62] are not permitted.

• *Time Periods*. Where contracts specify time periods that conflict with insolvency statutes, they will not be enforceable. For example, a secured creditor's purported contractual right to enforce security without notice or on short notice is not valid if it conflicts with the 10-day notice period found in BIA. [63]

• *Priority of Claims / Equity Claims*. A contractual provision that purports to alter the priority of a claim (*e.g.*, a "first-ranking lien") that conflicts with statutory priorities will not be enforceable. However, courts will generally not interfere with intercreditor agreements that alter the priorities of claims between one creditor and another because such a clause does not directly involve or alter the interests of the debtor. [64] Both the BIA and CCAA statutorily subordinate "equity claims" (as defined) [65] and limit the ability to vote such claims; these provisions trump any conflicting contractual rights or purported priorities.

• *Unlawful Transactions*. A contractual provision that contemplates or requires an illegal act will never be enforceable, irrespective of insolvency law. Because this rule is not specific to insolvency law, it is generally not considered further in this article. However, certain unlawful contractual provisions may be of particular relevance in insolvency situations; namely, contractual provisions that consist of, require, or effect: (i) a criminal rate of interest; and (ii) a reviewable transaction, such as a preference, a transfer at undervalue, a fraudulent conveyance, the payment of a shareholder dividend or the redemption of shares while insolvent or on the eve of insolvency, or an inappropriate payment of compensation to a director or officer. The BIA and CCAA — and a number of provincial statutes dealing with similar unlawful conduct — contain extensive statutory provisions designed to challenge and overturn any such transactions. [66]

In addition to contractual provisions that are always unenforceable in insolvency due to conflicts with statute, there are other contractual provisions that courts may or may not choose to enforce, based on the exercise of statutory discretion expressly conferred on the courts. In other words, an express statutory provision may be found dealing with the subject matter but permitting a discretionary result. Contractual provisions that may be enforced or negated at the discretion of the court, based on an express statutory authority, include:

• *Forced Assignment of Contracts*. The BIA and the CCAA permit contracts to be assigned without obtaining the counterparty's consent, despite any contractual consent requirements to the contrary. [67] Courts have noted that this power is extraordinary. [68] Accordingly, both the BIA and the CCAA give protections to the non-consenting counterparty, including: (i) notice requirements; (ii) consideration of the views of the court-appointed officer; (iii) a requirement that the court consider whether the assignee would be able to perform the assumed obligations; and (iv) a requirement that an agreement may only be assigned if all monetary defaults in relation to the agreement (other than those arising by reason of the insolvency) are remedied by a specified date. [69] Further, the courts' power to force assignment does not extend to: (i) post-commencement agreements; (ii) eligible financial contracts; and (iii) collective bargaining agreements.

The courts will not sanction unfair interference with contractual rights, and counterparties must be treated fairly and equitably; [70] the courts must be satisfied that a forced assignment is important to the restructuring process. [71] Where the debtor has multiple contracts with a single counterparty, courts may be hesitant to selectively assign some, but not all of those contracts where it would cause significant prejudice to the counterparty. [72] Where a contract provides that consent shall not be unreasonably withheld, the courts may prefer that the parties first seek such consent before asking the courts to negate the consent requirement (and in any event, a CCAA proceeding cannot eliminate contractual rights such as consent rights without notice and the other safeguards noted above). [73]

• *Critical suppliers*. Pursuant to section 11.4 of the CCAA, the court, at the behest of an insolvent debtor, can declare parties that supply the debtor with goods or services to be critical suppliers if the court is satisfied that the goods or services supplied by such supplier are critical to the debtor's continued operations. [74] In such case, the court is empowered to order the supplier to supply the goods or services specified by the court on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate. The authority provided by section 11.4 does not detract from the inherently flexible nature of the CCAA or the court's inherent jurisdiction to grant relief to facilitate the debtor's restructuring. [75] Accordingly, courts have granted broad orders authorizing debtors to determine which of their suppliers are critical and to pay amounts related to pre- and post-filing obligations to those suppliers, so long as any such payments are subject to the monitor's consent and oversight (and no pre-filing obligations are secured by a critical supplier charge). [76]

However, section 11.4's broad language gives rise to a risk that the debtor could request, and the court might find appropriate, altered supply terms that are inconsistent with an existing supply agreement. It is unlikely that a court would alter fundamental terms such as pricing in the absence of compelling circumstances. The norm is for supply to be ordered on existing terms, not new terms. However, a critical supplier may be obligated to extend credit terms, especially where such credit terms are part of the existing supply agreement, whereas other suppliers that are not critical suppliers are entitled upon insolvency to insist on cash on delivery terms and cannot be obligated to extend credit, even if the supply agreement otherwise provides for this.

Where a supplier is declared to be a critical supplier, the court has the authority to grant a priority charge on all or part of the insolvent person's assets to secure the post-filing supplies of goods and services. Such charge is usually capped rather than securing an unlimited amount, and is usually given a priority ahead of existing secured and unsecured claims. However, critical supplier charges are potentially subordinated to other priority charges granted by the court in the insolvency case, such as court-ordered charges securing administrative costs, debtor-in-possession financing, and obligations owed to directors and officers. Courts often grant single charges in favour of several critical suppliers on a shared, *pari passu* basis, as opposed to separate charges for each supplier.

• *Stays of Proceedings*. Statutory stays of proceedings arise under the BIA for bankruptcy and proposal proceedings. [77] To the extent contractual agreements purport to provide rights that are captured by these stays (*e.g.*, rights of termination or rights to sue the debtor for damages or specific performance or rights to repossess property), those provisions will be unenforceable. However, the counterparty may apply to court for a declaration that such a stay does not apply to its contract, which the court may grant if it is satisfied that the stay would result in material prejudice to the counterparty or if there are otherwise equitable grounds to make such a declaration. [78]

• *Corporate Governance*. Both the BIA and CCAA permit but do not obligate the court to remove directors, fill vacancies, and order indemnification with respect to insolvent companies. [79] This authority supersedes any contractual restrictions set out in unanimous shareholder agreements or other contracts.

• *Arbitration Clauses*. Courts may declare contractual arbitration clauses to be stayed or unenforceable against a debtor by operation of provincial arbitration legislation. The Supreme Court of Canada noted that a counterparty's commencement of insolvency proceedings can render arbitration clauses statutorily "inoperative" where enforcing the clause would compromise the orderly and efficient resolution of insolvency proceedings. [80] Instead, courts may prefer to resolve the dispute in the insolvency proceedings themselves for greater efficiency and a speedier outcome, particularly where the dispute is of significant importance to the debtor or its creditors. [81] Where arbitration clauses have not been enforced, it has typically been premised on a fundamental conflict between the contract and insolvency statutes, or between contract and express statutory authority conferred on the courts (*i.e.*, a more serious and direct conflict, and not simply a matter of judicial preference or general discretion). For this reason, the party seeking to negate the arbitration clause must establish that its enforcement would compromise the integrity of the insolvency proceedings.

• *Contractual Rights of Set-Off*. Both the BIA and CCAA purport to protect rights of set-off that exist at law (which includes contractual rights of set off). [82] However, the courts have embraced rather contrived arguments by insolvent debtors to narrow the scope and effect of these statutory protections. [83] It has been held that although the courts are statutorily barred from negating set-off rights entirely, they are not barred from staying set-off temporarily (even though the end result is the same for the contractual counterparty). And there has been particular focus on denying the set off of pre-commencement contractual obligations against post-commencement contractual obligations. Apart from these general principles, the BIA and CCAA both expressly permit set-off (and close-out netting) in respect of eligible financial contracts. [84]

Three conclusions should be stressed in light of the above discussion. First, express conflicts with a statute result in predictable outcomes in every case. For example, an *ipso facto* clause is always unenforceable in BIA and CCAA restructuring proceedings; there is no scenario in which an *ipso facto* clause might be enforceable in some restructuring proceedings and unenforceable in others. Second, where courts have an express statutory discretion to negate contract, the specific type of contractual provision to which it applies is certain. For example, at the time parties contract and obtain a consent right to an assignment of the contract, they know that this is a type of provision that might not be enforceable in insolvency, and they know the criteria that will be applied in making that determination. They are not left wondering what provisions in their contracts may in the future be challenged and unenforceable — they know with precision where insolvency courts may wade in and what considerations will be relevant. Third, in each instance in which a contractual provision is not binding in insolvency, it is because the clause is fundamentally unenforceable rather than a breach of contract or other wrongful act of the insolvent person. The clause is unenforceable, not disclaimed or repudiated, and there is no entitlement to damages by the counterparty. There is, for example, no damages claim for an unenforceable *ipso facto* clause or for an assignment of contract without consent.

(b) Conflicts with Court Orders

Where insolvency courts have authority to make an order, such authority and the resulting substance of the order made cannot be ousted, delineated or circumscribed by contract. Any provision of a contract that purports to grant rights or remedies, or to dictate outcomes, that conflict with court orders would typically be of no force or effect. [85]

In many instances, court orders may contain provisions dealing with the same matters that emanate from statute (*e.g.*, stays of proceedings, notice periods, other time periods, etc.). The exercise of an express statutory discretion may result in the making of an order that reflects the result (*e.g.*, a forced assignment of contracts, or a critical supplier order). But in other cases, court orders will address subject matter for which there is not an express statutory provision on point.

Just as impugned contractual provisions cannot withstand their conflict with statute, so too they will typically not withstand any conflict with court orders. For example:

• *Stays of Proceedings*. A fundamental feature of virtually all Canadian insolvency proceedings is the stay of proceedings. When a debtor commences proceedings under the CCAA, WURA or CBCA, or where a receiver is appointed in respect of the debtor or its property, a stay arises from court order rather than automatically from statute. Accordingly, any purported contractual right against a debtor that conflicts with a court-ordered stay (*e.g.*, termination of the contract, enforcement of a contractual obligation, etc.) cannot be exercised at first instance. As is the case with statutory stays in bankruptcies or BIA proposal proceedings, contractual counterparties can apply to court to lift the stay in order to exercise their rights under the contracts. [86]

• *Continued Supply*. If the court enters an order that requires a crucial supplier to continue supplying goods or services to a debtor, the supplier's contractual rights to vary the terms of supply or otherwise cease supplying under its existing agreement with the debtor may not be exercised if such provision conflicts with the supply order. See the discussion on critical suppliers above.

• *Interference with Court Officer*. Insolvency orders confer a multitude of powers and obligations on the court officer appointed in respect of the insolvent debtor and/or its property. Accordingly, contractual provisions that interfere with this mandate are generally not permitted. For example, a clause purporting to deny a trustee, receiver, liquidator, or monitor possession of or access to premises or property, books and records, etc., would generally be void, especially where the clause conflicts with the specific terms of the appointment order.

• *Vesting Orders*. A sale approval and vesting order might expressly override certain contractual provisions. Even more so with a reverse vesting order. Prohibitions on the disposition of assets or a change of control may be negated, contracts may be assigned and assumed contrary to their terms, and security interests may be eliminated from assets and transferred to proceeds of sale. Such orders may also affect claims arising from contracts, including releasing or channeling such claims. And these orders may go further and purport to cleanse existing defaults, such as the debtor's being insolvent, having commenced the restructuring proceedings, and/or having effected the sale transaction and related steps. They may also release any right to act on such defaults or exercise any contractual rights relating thereto on closing of the sale transaction, or otherwise release claims of contractual counterparties.

• *Orders approving BIA Proposals and CCAA Plans*. Orders approving BIA proposals or CCAA plans (or corporate plans of arrangement) may expressly or implicitly provide for the negating of specific contractual terms, in much the same manner set out above in respect of sale transactions. Indeed, a compromise by definition consists of a change in existing rights, and the law is well settled that plans and proposals may affect or alter creditors' rights (including, potentially, those of contractual counterparties). However, proposals, plans, and arrangements are not contracts and should not be likened to contracts. [87] It is unfortunate that some courts have likened plans and proposals to contracts, given the confusion this creates and the inability to reconcile insolvency law with contract law in this respect (*i.e.*, the unilateral preparation of a "contract" altering or affecting the rights and interests of others to which some subset of objecting parties may be bound against their wishes, which the court then makes binding on the parties). [88] In one instance, a court held that a plan amounts to a contract so as to require that the principles governing the interpretation of contracts be applied. [89] In *Metcalfe*, [90] the Ontario Court of Appeal held that a BIA proposal and CCAA plan should be treated as a contract between the debtor and its creditors such that anything that might lawfully be incorporated into a contract can be incorporated into a proposal or plan. This is confusing and runs counter in myriad ways to the principles of contract law — not least of which is

binding dissenting parties to a supposed contract they do not willingly enter into. The preferred construction is that a plan or proposal effected through operation of insolvency law is a means by which courts — through sanction orders — may lawfully affect and alter the rights of contractual counterparties (among other creditors and shareholders).

• *Covenants*. Positive or negative covenants found in contracts that are at odds with the bankruptcy or insolvency process will generally be found invalid, such as a prohibition against the granting of encumbrances that conflicts with a court-ordered priority charge or a clause that purports to prevent a debtor from seeking relief under insolvency legislation.

• *Priority of Court-Ordered Charges*. A contractual provision that purports to prohibit or have a priority ahead of court-ordered charges is void.

• *Payments*. A contractual provision that specifies a timing for payments that conflicts with a court order is generally invalid. For example, rent for a real property lease is typically payable monthly in advance, but many court orders will authorize a different payment schedule (*e.g.*, twice monthly in advance on the 1st and 15th of each month, notwithstanding the terms of the lease).

• *Collective Agreements*. A term of a collective agreement that conflicts with a court order will generally be invalid. For example, a court order that suspends an obligation to make pension deficit payments will override such a requirement under a collective agreement.

At all times, court orders must of course be consistent with the authority granted to the courts in insolvency law and with a view to the objects of the particular insolvency statute in question. But this can be a tricky course to navigate where insolvency law provides little direction, such as frequent statutory invitation to make such orders as courts think fit in the circumstances. [91] Because of the broad range of potential conflicts that can occur between a contract and a court order, courts and court-appointed officers must be mindful of tactical or strategic efforts by an insolvent debtor (or influential stakeholders, such as secured lenders) to attempt to overcome an undesirable contractual provision simply by seeking a court order that creates such a conflict. Courts should be especially leery of the "magic wand" approach to insolvency law: that is, making lawful what would otherwise not be lawful simply by issuing an order — based on amorphous judicial discretion — purporting to authorize or direct a result. There is potential for significant abuse if debtors are permitted to negate enforceable contractual provisions merely by asking for court orders containing clauses that by their terms conflict with — and therefore have the effect of rendering unenforceable — the contractual provisions in question.

Again, where a contractual provision conflicts with a court order, it is fundamentally unenforceable and does not give rise to a damages claim in favour of the counterparty. Further, the court orders in question typically advance — directly and not merely indirectly — a fundamental object of insolvency law (*e.g.*, sanctioning of a restructuring plan, approval of a restructuring sale transaction, providing for fair and orderly proceedings, etc.); the impact on contract is necessarily incidental to this exercise rather than a primary focus. Such orders are premised on curtailing contractual interference (whether intentional or unintentional) with the successful workings of the insolvency process; they are not exercises in assisting opportunistic debtors and stakeholders in aggressively beating up on counterparties to gain an advantage.

(c) Contrary to Public Policy

Where a contractual provision is offensive but not expressly contrary to statute or court order, the courts may still refuse to give effect to it. A clause that is triggered by a party's insolvency and that thereby causes subsequent unfairness or prejudice to the rights of the insolvent party or its creditors generally may be unenforceable as a matter of public policy.

For many years, the courts refused to give effect to various schemes by which shareholders attempted to maneuver contractually to gain an unfair advantage in insolvency (*i.e.*, by purporting to become creditors with debt claims upon insolvency, such as through the assertion of claims for misrepresentation, claims for dividends, exercises of conversion rights, etc.). With the codification of equity claims in the BIA and CCAA, Parliament put an end to these efforts. But this example illustrates that the courts will preclude on public policy grounds efforts to gain an unfair advantage or benefit in insolvency proceedings through

contract. The fundamental underpinning of this exercise by the courts is a conviction of something untoward that the parties (particularly the non-insolvent counterparty) are attempting to effect to their unfair advantage.

The most common prejudice to creditors arises where a contract purports to remove value from the debtor's estate, thereby triggering the "anti-deprivation rule" (also called a "fraud on the insolvency law"). The anti-deprivation rule has been partially codified in the BIA and CCAA,[92] and upheld by the Supreme Court of Canada in *Chandos Construction Ltd. v. Deloitte* [*Chandos*].[93]

The Supreme Court of Canada has established a two-part "effects-based" test for the anti-deprivation rule: (i) the relevant clause must be triggered by an event of bankruptcy or insolvency; and (ii) the effect of the clause must be to remove value from the insolvent person's estate.[94] Indeed, each of the following examples where a contractual provision was not enforced on policy grounds contain both such elements:

- *Conversion of Unsecured Debt to Secured Debt*. A contract cannot purport to elevate the priority of claims upon an insolvency (*e.g.*, obtaining a security interest over assets where none existed prior to the insolvency). Such an elevation would permit that creditor to obtain a preference over other creditors, resulting in a different distribution upon the counterparty's insolvency than which the law provides.[95]

- *Automatic Disposition of Assets*. A contract may not dispose of a debtor's assets upon insolvency or to otherwise bestow an advantage on one creditor over the others in a manner that results in a different distribution from that which insolvency law provides.[96] For example, a partnership was not permitted to exercise its contractual right to pay out only 50 percent of a bankrupt partner's stated capital account due to his insolvency, as that would have deprived creditors of the other 50 percent of the bankrupt's largest asset.[97]

- *Forfeiture of Rights / Interests or Forgiveness of Debt*. A contract may not forfeit the debtor's rights upon insolvency where those rights provide value for creditors. For example:

  - A trustee was permitted to receive a portion of the surplus in a pension plan ratably in proportion to the contributions made by the bankrupt, despite the plan's constating documents providing that any surplus be paid to the plan's beneficiaries.[98]

  - A contractual provision removing a debt owing to a bankrupt prior to his bankruptcy was not enforced because, among other reasons, it would have removed that amount from the reach of his creditors.[99]

  - A clause in an agreement providing that a life interest in real estate shall cease upon the bankruptcy of the holder of the life interest is not enforceable.[100]

  - A lease for which there is forfeiture of all improvements, materials, and effects of the bankrupt upon bankruptcy is not valid.[101]

  - A provision in a contract purporting to relieve a party of its obligation to pay outstanding amounts owing upon termination of the agreement is not enforceable where the termination is triggered by a monetary default that arises as a consequence of bankruptcy (*i.e.*, the anti-deprivation rule was applied even though the clause was not directly triggered by the bankruptcy, which may imply that the first part of the Supreme Court's test in *Chandos* — that the clause be triggered by bankruptcy or insolvency — might not always apply in its strictest sense).[102]

- *Purchase Options / Purchases at Discount*. A contract may not permit a counterparty to purchase property from the debtor at a price that is less than its fair market value if creditors would otherwise receive the value of that discount. For example:

• A contractual right to purchase a partnership interest at the lesser of its book value and fair market value upon a partner's insolvency was not enforced because the amount would be less than what creditors would otherwise obtain from the market. [103]

• While a contractual right of first refusal in a shareholders' agreement to purchase a shareholder's shares upon his bankruptcy was found to be valid and enforceable, the court refused to enforce a provision entitling the other shareholders to a 20% discount on those shares. [104]

• A right of first refusal to purchase real property was found to be a personal right and did not form an interest in land [105] — accordingly, it should be subject to a vesting order and not bind a third-party purchaser.

• An agreement to sell land entered prior to the vendor's bankruptcy was not permitted to close because the proceeds of sale would have been insufficient to discharge the encumbrances on the land, leading to a shortfall for unsecured creditors. [106]

• Likewise, a counterparty was not permitted to exercise an option to purchase land because it would have reduced the value of the bankrupt's estate. [107]

However, see further below for instances in which purchase options have been upheld.

• *Rights of Use*. A contractual right to take possession of and to use the property of a counterparty upon its bankruptcy does not pass title to the solvent counterparty or otherwise defeat or modify a trustee's entitlement to those assets, which vest in the trustee on the date of bankruptcy. [108] However, such a provision is enforceable if not conditioned on bankruptcy (see below).

• *Bonus, Penalty, or Premium Payable on Bankruptcy or Insolvency*. A contract that provides for a bonus, penalty, or premium in the event of bankruptcy or insolvency may not be enforceable. [109]

Where the courts invoke public policy, it is to prevent an unfairness or wrongdoing and not simply to bestow an advantage upon an insolvent debtor. In each of the examples above, the courts found the contractual provisions in question to be offensive in the sense of bestowing an unfair benefit to the detriment of creditors (as opposed to merely the insolvent debtor). The impugned provisions amounted to a scheme that conflicted with the objects of insolvency law, including the fair treatment of creditors and ratable distribution of property. As such, the provisions in question were unenforceable and the counterparty generally had no damages claim arising from the inability to enforce its contractual rights. And importantly, parties at the time of contracting would have reason to suspect that these attempts to gain undue advantage upon an insolvency might not be enforceable. It does not undermine the integrity of either contract law or insolvency law that parties may not be permitted through contract to "game the system".

(d) Exercise of Jurisdiction by Courts

A court may elect to override or negate a portion of a contract even in the absence of an express statutory provision to that effect or a conflict with a court order or a public policy concern simply by relying upon its statutory or inherent jurisdiction. But it rarely happens.

Courts have held that their inherent jurisdiction, codified through section 11 of the CCAA and section 183 of the BIA, permits them in appropriate circumstances to ignore or override select contractual provisions. However, if no other lawful basis for interfering with contracts can be found, reliance on statutory or inherent jurisdiction to do so should be exercised sparingly and in exceptional circumstances only. Given the strong emphasis in Canadian law on honesty and good faith in the performance of contracts, [110] insolvency courts should be especially mindful not to engage their considerable discretionary powers in a manner that assists an insolvent party in unduly escaping select contractual obligations. Whereas contracting parties are well-equipped

to know at the time a contract is entered into that all or portions of the contract may be rendered unenforceable by statutes, court orders, and public policy, it is exceedingly difficult for parties to anticipate more arbitrarily and unpredictable future exercises by courts of residual jurisdiction to otherwise selectively interfere with contracts.

A sound and principled basis should therefore be found for contractual intrusion where neither Parliament nor the common law has provided directly for such interference with contract. Statutory or inherent jurisdiction is not a license to disregard otherwise settled law, nor an invitation to undermine the foundations of contract law. Courts should be reticent to invoke statutory and inherent jurisdiction do indirectly what it is clear they would not do directly (*i.e.*, effectively rewriting contracts at the behest of one party and then binding the counterparty to its performance, impairing both freedom of contract and sanctity of contract).

For these reasons, it is perhaps not surprising that there are few reported instances in which the courts refused to enforce a contractual provision in insolvency that did not fall into one of the three categories considered above. Where courts have relied upon their statutory or inherent jurisdiction as a basis for refusing to give effect to specific contract provisions that are not otherwise impugned by statute, court order, or public policy, it is chiefly not simply because the insolvent debtor wishes to escape its bargain or because negating contract would achieve some utilitarian or preferential objective (such as enhancing recoveries for a secured creditor by imposing loss on an unsecured contractual counterparty). Rather, the contractual provisions in question are generally found to be abusive and, in some sense, wrongful — even if not amounting to public policy concerns — such that they offend the court or unduly impede the insolvency proceedings.

Examples in which this has occurred include:

- *Oppression*. The court has relied on the Ontario *Business Corporations Act*'s oppression remedy and its broad power under that Act to make such orders as it thinks fit to override a consent requirement in a unanimous shareholders agreement (USA), which a shareholder purported to exercise in order to veto a proposal that had been approved by creditors under the BIA. [111] It is oppressive to permit a shareholder, whose shares hold no economic value, to exercise its veto right under a USA and end the corporation's prospect for a restructuring when virtually all of the shareholders, directors, creditors, and employees believe that a corporation has a future (and expressed that belief through their votes on the proposal). [112]

- *Commencement of Proceedings*. In some instances, contractual restrictions prohibiting or conditioning the commencement of insolvency proceedings may be treated as contrary to public policy and unenforceable on that basis (as discussed above). Alternatively, the courts may also view such clauses as interfering with the court's jurisdiction. For example, a court refused to annul a debtor company's assignment in bankruptcy on the basis that, while the director who had made the resolution authorizing the assignment was restricted from doing so without a shareholder's consent pursuant to a USA, the assignment was otherwise justified in the circumstances. [113] Recourse to insolvency legislation and the jurisdiction of insolvency courts cannot be ousted or restricted by contract. [114]

5. INSTANCES IN WHICH COURTS HAVE REFUSED TO INTERFERE WITH CONTRACTS

As the previous discussion illustrates, there are numerous rules and principles that counterparties must contend with if they want to enforce their contracts against an insolvent debtor. However, as an organizing principle where insolvency law and contract law conflate, the courts ought not to interfere with a contract's provisions where such provisions do not conflict with statute, orders of the court, public policy, or the court's otherwise proper exercise of its statutory or inherent jurisdiction. As such, there are numerous cases in which the courts have respected the sanctity of contracts and refused to do harm to contractual bargains struck by the parties.

(a) Purchase Options

As a rule of thumb, a contractual option to purchase an insolvent debtor's property will generally be found void as violating the anti-deprivation rule unless, among other things, the option provides fair value to the debtor's estate. The following cases illustrate that courts will uphold purchase options where fair value is provided (and where creditors are not deprived of value by the option's exercise):

• A right of first refusal in a shareholders agreement was found to be binding on a trustee in bankruptcy, who was obligated to complete a transaction for the sale of a shareholder's shares that was entered into prior to the shareholder's bankruptcy. [115] However, the agreement also contained a provision providing for a 20 percent discount on the price paid for those shares upon the shareholder's bankruptcy, which the court refused to enforce as being against public policy (see discussion above). [116] In other words, courts will only enforce a purchase option for a bankrupt's property if the sale price provides fair value.

• A tenant was permitted to exercise an option to purchase lands from its insolvent landlord granted by a commercial lease, because the debtor's BIA proposal — which did not take into account the purchase price of the land and therefore did not impact the interests of other creditors — had already been approved by creditors and sanctioned by the court. [117] In line with the Supreme Court of Canada's effects-based test for the anti-deprivation rule, discussed above, the court emphasized that the insolvent landlord and its creditors were not deprived of any value through the option's exercise. [118]

However, the likelihood of a court enforcing a purchase option increases if the option involves real property. For example, where an option to purchase land provides the optionholder with the right to compel a conveyance of land upon the occurrence of specified events that are solely within its control, the option creates an immediate equitable interest in land in its favour. [119] Such an option runs with the land and is enforceable against a subsequent purchaser of the land with notice of the option. [120] In the context of a proposal proceeding under the BIA, an agreement that provided a mortgagee with such an option to purchase a debtor's real property was held to create an immediate interest in the property in favour of the mortgagee, and, as a result, the debtor was not permitted to disclaim the agreement. [121] However, it is unclear whether an option to purchase land creates an immediate interest in land where the events required to trigger the option are not entirely within the optionholder's control. [122] The analysis may turn on other factors such as the intention of the parties to the option agreement. [123]

(b) Automatic Conveyance Upon Bankruptcy

While automatic conveyances of a debtor's property upon its bankruptcy or insolvency are often found to be void as being against public policy (*i.e.*, as a violation of the anti-deprivation rule), some caselaw has upheld such provisions. An automatic disposition of assets may be permitted where it does not remove value from the debtor's estate to the detriment of other creditors (in accordance with the Supreme Court's effects-based test for the anti-deprivation principle, described above).

Additionally, some caselaw has assessed the anti-deprivation rule through the lens of the "*bona fide* commercial purpose" test, which was adopted by the Supreme Court's dissenting opinion in *Chandos*. This test seeks to ascertain the purpose of the impugned contractual provision: if it was entered into for a legitimate commercial reason (*e.g.*, not for a fraudulent purpose, not to grant one creditor a preference over others, etc.) then the anti-deprivation rule is not triggered, even where it removes value from the debtor's estate. [124] For example, an automatic reconveyance of a performing arts facility on bankruptcy to a municipality was upheld on the basis that prior consideration had already been given for this right, and that the arrangements were "bona fide contractual arrangements" between parties acting in good faith without any fraud or design to create any preference. [125] However, query whether the (subsequent) *Chandos* decision effectively renders this test inoperative, given that it was adopted only by a dissenting minority.

(c) Grant of Exclusive Rights

As noted above, a trustee in bankruptcy does not have a general power to disclaim contracts. A trustee was not permitted to disclaim an agreement under which a bankrupt sold its Canadian marketing rights for an upcoming film to a creditor, and the agreement was thus binding on the trustee. [126] The court noted, however, that the trustee could abandon the contract if it chose to do so. [127]

(d) Debtors and Creditors with "Unclean Hands"

A contractual provision that purports to automatically terminate a contract and cause a fee to be payable upon a counterparty's bankruptcy is generally void as violating the anti-deprivation rule. However, courts might not strictly apply this rule in instances where the conduct of the debtor, creditors and/or court-appointed officer is unfair or unreasonable towards the counterparty.

For example, an Ontario court enforced the provisions of a debtor's contract that provided for automatic termination and for a fee to become payable to the counterparty upon the debtor's insolvency. The debtor had planned receivership proceedings for months, but it kept the counterparty, which managed the debtor's business operations, in the dark so as to induce it to continue operating its business. [128] In order to protect its own interests, the counterparty withdrew fees from certain accounts pursuant to the agreement. During the debtor's receivership, the receiver, in anticipation of selling the debtor's business to a third party, paid most of the debtor's trade creditors and unsecured creditors (without any legal obligation to do so) except for the counterparty, thereby maximizing the value of the business for the secured creditors and protecting substantially all unsecured creditors (again, except for the counterparty). The court ultimately held that the bankruptcy and insolvency regime takes a "very dim view" of businesspeople continuing to trade knowing that they are insolvent, and permitted the counterparty to rely on the termination and fee provisions of its contract. [129]

(e) Right to Use

If a contractual provision allows for the possession and use of the property of a counterparty in the event of his default in fulfilling the contract and such a right is invoked after the counterparty's bankruptcy, courts have held that such a provision is valid. [130] However, this only applies where the contractual default is not the fact of the counterparty's bankruptcy; as noted above, if the provision is conditioned on bankruptcy, it is not enforceable. [131]

6. CONCLUSION

If contracting parties are unable to predict with a reasonable degree of certainty how their contracts might be treated if their counterparty enters insolvency proceedings — which is a potential outcome for virtually every person with a contract — risks, costs, and inefficiencies increase across the entire Canadian economy. This cursory exploration of the legal framework governing contracts under insolvency law has endeavoured to find that certainty. As muddled and confusing as the patchwork of case law may sometimes appear, there is in fact an underlying paradigm with which to explain with consistency and predictability the treatment of contracts in insolvency.

Ultimately, all parties are best served by courts that take time to explain how and why they cause or permit contracts to be treated in various ways in the course of insolvency proceedings, and to establish and reinforce the governing principles that are being applied. As tempting as it is in the world of insolvency to become beholden to attaining desirable economic and legal outcomes at all costs, contract law is simply too important to permit capriciousness to manifest through insolvency law.

In most instances, the treatment of contracts in insolvency proceedings can be explained in the context of statutes, court orders, and public policy. Rarely will it be necessary to stray beyond these constructs but, where applicable, judicial discretion may be engaged. While the extraordinary discretion conferred on judges by insolvency legislation facilitates efficient and flexible outcomes in complex commercial insolvencies, this discretion should not readily be applied in a manner that undermines contracting parties' reasonable expectations and legitimate legal and commercial interests. Where a court finds that the equities or practical realities of a matter require it to depart from this well-trodden framework set out above, it must strive to ensure that: (i) there is a compelling reason for such departure that significantly advances the objects of the applicable statute; (ii) minimal violence is done to the counterparty and its contract, proportionate at the very least to the benefit obtained; and (iii) the desired outcome cannot be achieved by some other less drastic means.

Footnotes

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1 See *Paradine v. Jane* (1647), 82 E.R. 897 (Eng. K.B.).

2 See, *e.g.*, *Bhasin v. Hrynew*, 2014 SCC 71 (S.C.C.) [*Bhasin*]; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 (S.C.C.) [*Callow*]; and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 (S.C.C.) [*Wastech*].

3 R.S.C., 1985, c. B-3 [BIA].

4 R.S.C., 1985, c. W-11 [WURA].

5 R.S.C., 1985, c. C-36 [CCAA].

6 R.S.C., 1985, c. C-44 [CBCA].

7 There are nuanced but important distinctions between disclaimer and resiliation, but those are beyond the scope of this article.

8 *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para. 40 [*Guarantee Co.*].

9 *Guarantee Co.*, *ibid.*, at para. 39.

10 BIA, *supra* note 4 at ss. 65.11(1) and 65.2(1).

11 CCAA, *supra* note 6 at s. 32(1).

12 BIA, *supra* note 4 at ss. 65.11(1) and 65.2(1); CCAA, *ibid.*, s. 32(1).

13 See, *e.g.*, *Whiteley v. Steele's Stores Ltd. Estate (Trustee of)*, [1933] O.J. No. 59 (Ont. C.A.) at para. 7.

14 BIA, *supra* note 4 at s. 65.2(1).

15 BIA, *ibid.*, ss. 65.11(1), (4) and (9); CCAA, *supra* note 6, s. 32(1), (3) and (8).

16 BIA, *ibid.*, ss. 65.11(3) and 65.2(2); CCAA, *ibid.*, s. 32(2).

17 BIA, *ibid.*, ss. 65.11(5) and 65.2(3); CCAA, *ibid.*, s. 32(4).

18 BIA, *ibid.*, s. 65.11(7); CCAA, *ibid.*, s. 32(6)

19 BIA, *ibid.*, s. 65.11(10); CCAA, *ibid.*, s. 32(9); see also *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85 (Alta. C.A.).

20 BIA, *ibid.*, s. 65.2(4); CCAA, *ibid.*, s. 32(7); see also, *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, s. 38 [CTA].

21 For a time, *Cummer-Yonge Investments Ltd. v. Fagot* (1965), 8 C.B.R. (N.S.) 62 (Ont. H.C.); affirmed without reasons (1965), 8 C.B.R. (N.S.) 62 (Note) (Ont. C.A.), held that guarantees could be adversely impacted by disclaimer; however, that line of cases was corrected by the Supreme Court of Canada in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 (S.C.C.).

22 BIA, *ibid.*, ss. 65.11(3) and 65.2(2); CCAA, *ibid.*, s. 32(2). See also, *e.g.*, *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364 (B.C. C.A.) at para. 30.

23 See, *e.g.*, *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 1746 (B.C. S.C.) at para. 72

24 See, *e.g.*, *Erin Features No. 1 Ltd., Re* (1991), 8 C.B.R. (3d) 205 (B.C. S.C. [In Chambers]); *Triangle Lumber & Supply Co., Re* (1978), 21 O.R. (2d) 221 (Ont. H.C.).

25 *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (S.C.C.) at para. 28.

26 Unfortunately, on occasion the courts have confused this. For example, in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154 (B.C. C.A.) at paras. 29-31, the B.C.C.A. held there is a common law power in trustees to "disclaim" executory contracts. Respectfully, that is not correct. A trustee's rights to reject contracts is distinct from disclaimer and not merely a common law form of disclaimer.

27 See, *e.g.*, *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, 2007 SCC 55 (S.C.C.) at para. 20; *Remedy Drug Store Co. v. Farnham*, 2015 ONCA 576 (Ont. C.A.) at para. 42.

28 For early consideration of the law of repudiation of contract in Canada, see cases such as: *Freeth v. Burr* (1874), L.R. 9 C.P. 208 (Eng. C.P.); and *Sanders v. Baby* (1856), 5 U.C.C.P. 441 (U.C. C.P.). See also: Donald M McRae, "Repudiation of Contracts in Canadian Law" (1978), 56:2 Can. Bar Rev. 233.

29 See, *e.g.*, *Guarantee Co.*, *supra* note 9 at para. 40.

30 See, *e.g.*, *New World Screen Printing Ltd. v. Xerox Canada Ltd.*, 2003 BCSC 1685 (B.C. S.C.) at para. 29.

31 See, *e.g.*, *TNG Acquisition Inc., Re*, 2010 ONSC 6119 (Ont. S.C.J. [Commercial List]) at para. 7, ; affirmed 2011 ONCA 535 (Ont. C.A.); and L.W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. Looseleaf (Toronto: Thomson Reuters, 2013) at §5:252 (Contractual Rights) [Houlden, Morawetz & Sarra].

32 *Ibid.*

33 See, *e.g.*, *Saan Stores Ltd. v. Nova Scotia (Labour Relations Board)*, 1999 NSCA 26 (N.S. C.A.) at para. 49, citing *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.) (although note that the court unhelpfully mixed up the concepts of rejection and disclaimer).

34 Houlden, Morawetz & Sarra, *supra* note 32 at §5:252 (Contractual Rights).

35 BIA, *supra* note 4 at ss. 18(b) and 32.

36 Commercial List Model Orders, online: *Superior Court of Justice Practice Directions and Policies for Toronto* <https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/>, Model Receivership Order at para 3(c).

37 See, *e.g.*, BIA, *supra* note 4 at s. 30(1)(k).

38 See, *e.g.*, CTA, *supra* note 21 at s. 39(1).

39 See, *e.g.*, *Seaton v. Doucet* (1915), 59 Que. S.C. 92 (C.S. Que.); *H.K. Reed & Co. (No. 1), Re*, [1930] 4 D.L.R. 841 (Alta. C.A.); *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154 (B.C. C.A.) at paras. 29-31.

40 *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (S.C.C.) [*Peace River*].

41 In this case — in which a receiver sought to avoid being bound by a contractual agreement to arbitrate disputes even while it sued under the contract for amounts owing to the debtor — the doctrine of disclaimer arguably ought not to have been invoked at all. Where in an insolvency proceeding any party — be it debtor, trustee or receiver — purports not to be bound by a contractual provision by operation of insolvency law, such person is not disclaiming the provision. Contracts are disclaimed in their entirety, not piecemeal. More importantly, where a contractual provision — such as an agreement to arbitrate — is not enforceable by operation of insolvency law, there is no need of disclaimer. No person need disclaim an unenforceable contract or portion of a contract. The alternative approach adopted by the concurring minority of the Court in *Peace River* — namely, that such provisions are enforceable and therefore have to be disclaimed piecemeal — is highly problematic.

42 *Re Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.); *Minnie Pearl of Canada Ltd., Re* (1971), 15 C.B.R. (N.S.) 57 (B.C. S.C.); and *McKay, Re* (1922), 2 C.B.R. 462 (Ont. S.C.).

43 WURA, *supra* note 5 at ss. 19 and 35(1)(c).

44 See, *e.g.*, *McCarter v. York County Loan Co.* (1907), 10 O.W.R. 165 (Ont. H.C.) at para. 10; *Partington v. Cushing* (1906), 3 N.B. Eq. 322 (N.B. S.C.) at para. 1.

45 To be clear, the terminating party may, in some circumstances, have a continuing damages claim — although frequently termination, not damages, is the lone remedy where elected by the terminating party. It is the counterparty whose conduct has led to the termination by the terminating party that is bereft of any damages claim. Termination, being a lawful remedy, has not damaged the counterparty in the sense of being legally recoverable.

46 *Yukon (Government of) v. Yukon Zinc Corporation*, 2021 YKCA 2 (Y.T. C.A.); leave to appeal refused 2021 CarswellYukon 83 (S.C.C.); leave to appeal refused 2021 CarswellYukon 87 (S.C.C.).

47 See, *e.g.*, *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.).

48 *Peace River*, *supra* note 41.

49 *Cineplex Odeon Corp., Re*, 2001 CarswellOnt 2633, 106 A.C.W.S. (3d) 966 (Ont. S.C.J. [Commercial List]) at para. 5.

50 CCAA, *supra* note 6 at s. 11.04; see also, BIA, *supra* note 4 at s. 69.31(2).

51 The CCAA protections in favour of those holding guarantees were arguably only added to the statute because of repeated instances in which the courts permitted interference with these contracts. Even so, the courts have on occasion continued to purport to stay such persons anyway (*e.g.*, the CCAA proceedings of Target Canada, Bed Bath & Beyond, and, most recently, Nordstrom — ostensibly because the contracts at issue were indemnities rather than guarantees, and therefore not protected by CCAA provisions that refer only to guarantees and not also indemnities).

52 BIA, *supra* note 4 at s. 65.1; CCAA, *supra* note 6, s. 34.

53 BIA, *ibid.*, s. 65.1(7); CCAA, *ibid.*, s. 34(7).

54 BIA, *ibid.*, s. 84.2; CCAA, *ibid.*, s. 34.

55 BIA, *ibid.*, s. 84.2(5); CCAA, *ibid.*, s. 34(5).

56 BIA, *ibid.*, s. 84.2(7)-(9); CCAA, *ibid.*, s. 34(7)-(11).

57 BIA, *ibid.*, s. 84.2(4); CCAA, *ibid.*, s. 34(4).

58 See *An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, S.C. 2005, c. 3.

59 BIA, *supra* note 4 at s. 65.13; CCAA, *supra* note 6 at s. 36.

60 See, *e.g.*, *TNG Acquisition Inc., Re*, 2010 ONSC 6119 (Ont. S.C.J. [Commercial List]) at para. 29, ; affirmed 2011 CarswellOnt 8039 (Ont. C.A.).

61 *Criminal Code*, R.S.C., 1985, c. C-46, s. 347.

62 BIA, *supra* note 4 at s. 122(2); the interest stops rule also applies in CCAA proceedings, in part due to achieving harmony between the BIA and CCAA: *Nortel Networks Corp., Re*, 2015 ONCA 681 (Ont. C.A.) [*Nortel*], ; leave to appeal refused (2016), 42 C.B.R. (6th) 3 (S.C.C.). The rule also arises as a matter of public policy and not merely statute: it was held in *Nortel* to be a necessary corollary of the *pari passu* principle at common law.

63 BIA, *supra* note 4 at s. 244.

64 *Stelco Inc., Re*, 2007 ONCA 483 (Ont. C.A.) at para. 44.

65 BIA, *supra* note 4 at ss. 54(2), 54.1, 60(1.7), and 140.1; CCAA, *supra* note 6 at ss. 6(1), 6(8), and 22.1.

66 See, *e.g.*, BIA, *ibid.*, ss. 95-101.1; CCAA, *ibid.*, s. 36.1.

67 BIA, *ibid.*, s. 84.1; CCAA, *ibid.*, s. 11.3. See also *Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Corp.* (2006), 25 B.L.R. (4th) 293 (B.C. S.C.); affirmed 2007 CarswellBC 583 (B.C. C.A.), in which the court concluded that it could override contractual consent rights in the context of plans of arrangement under the *Business Corporations Act (British Columbia)*. In that case, the court held that the Act permitted arrangements that contemplated a transfer of property, and a contractual consent right was therefore at odds with the statute and would give a single creditor an effective veto over any plan that involved such a transfer.

68 *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 (Ont. S.C.J. [Commercial List]).

69 BIA, *supra* note 4 at s. 84.1; CCAA, *supra* note 6 at s. 11.3.

70 *Primus Telecommunications Canada Inc., Re*, 2016 ONSC 5251 (Ont. S.C.J. [Commercial List]); additional reasons 2016 ONSC 6943, 2016 CarswellOnt 17127 (Ont. S.C.J. [Commercial List]).

71 *Nexient Learning Inc., Re* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.).

72 *Ibid.*, para. 63; *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) at para. 13.

73 *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership* (2014), 13 C.B.R. (6th) 163 (B.C. S.C.); reversed on other grounds (2015), 30 C.B.R. (6th) 250 (B.C. C.A.). See also *Suen v. Suen*, 2013 BCCA 313 (B.C. C.A.).

74 CCAA, *supra* note 6 at s. 11.4.

75 *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 43 [*Canwest*]; *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) at para. 67.

76 See, *e.g.*, *Canwest*, *ibid.*, para. 43; *Re TOYS "R" US (CANADA) LTD.*, 2017 ONSC 5571 (Ont. S.C.J. [Commercial List]) at para. 9; *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 (Ont. S.C.J.) at para. 30.

77 BIA, *supra* note 4 at ss. 69-69.31.

78 BIA, *ibid.*, s. 69.4; see also *Great North Data Ltd., (Re)*, 2020 NLSC 105 (N.L. S.C.) at para. 11.

79 BIA, *ibid.*, ss. 64, 64.1; CCAA, *supra* note 6 at ss. 11.5 and 11.51.

80 *Peace River*, *supra* note 40 at para. 155.

81 *Mundo Media Ltd. (Re)*, 2022 ONCA 607 (Ont. C.A.) at paras. 9-10; see also, *Hayes Forest Services Ltd., Re* (2009), 57 C.B.R. (5th) 52 (B.C. S.C.).

82 BIA, *supra* note 4 at s. 97(3); CCAA, *supra* note 6 at s. 21.

83 One gets the sense that the courts would ideally prefer to negate contractual set-off rights on public policy grounds (being the third of the four bases upon which contractual provisions may be negated in insolvency); namely, because they typically result in a preference being obtained by the counterparty asserting the set-off and because the insolvent debtor (or its secured creditor) wants instead to enforce payment of amounts owing to it. However, there is longstanding law that has made abundantly clear that the preference afforded by set-off is lawful, making it all but impossible to now engage public policy objections. The result has been to instead put forward the fiction that the insolvency statutes, combined with judicial discretion, provide for the result of negating contractual set-off rights in large measure. However, it is highly improbable that any of the four bases for negating select contractual rights applies, particularly in light of the statutory preservation of set-off rights. If permitting set-off is so despaired, the principled course of action is to modify the statutes to restrict or eliminate — instead of protecting — these rights, contractual or otherwise.

84 BIA, *supra* note 4 at ss. 65.1(9) and 66.34(8); CCAA, *supra* note 6 at s. 34(8).

85 Some contracts unacceptably skirt *de facto* restrictions on the exercise by a court of its authority in making orders. For example, insolvency courts have frequently taken a dim view of debtor-in-possession (DIP) financing agreements that purport to make it a default in favour of the DIP lender where the court makes any order that is not in form and substance satisfactory to the DIP lender.

86 *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para. 20; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72 (Sask. C.A.) at para. 68.

87 Houlden, Morawetz & Sarra, *supra* note 32 at §21:2 (Compromises and Arrangements Generally) and 21:15 (Alteration or Modification of the Plan at the Creditors' Meeting): "A plan of arrangement under the CCAA is a proposal, not a contract. The binding force of the arrangement or compromise arises from the CCAA through the sanction of the court, not from the effect of terms mutually agreed upon. . . . *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (Qc. S.C.)." See also *Steinberg Inc. c. Michaud*, 1993 CarswellQue 229 (C.A. Que.) at paras. 43-45.

88 *Agro Pacific Industries Ltd., Re* (2007), 38 C.B.R. (5th) 161 (B.C. C.A.); *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); and *Bul River Mineral Corporation (Re)*, 2018 BCSC 39 (B.C. S.C.); additional reasons 2018 BCSC 326, 2018 CarswellBC 4121 (B.C. S.C.).

89 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (2002), 35 C.B.R. (4th) 43 (Ont. S.C.J.); affirmed (2003), 46 C.B.R. (4th) 239 (Ont. C.A.); leave to appeal refused 2004 CarswellOnt 1618, 2004 CarswellOnt 1619 (S.C.C.).

90 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 5432 (S.C.C.).

91 There is a long history of initial CCAA orders containing bespoke provisions affecting contractual counterparties in myriad ways. In large measure, the extent to which counterparties were affected by these *ex parte* orders led to statutory reform to limit the relief that could be obtained in such orders until a "comeback" hearing on notice to affected persons. Generally, contracts ought not to be varied in initial CCAA orders: *Allarco Entertainment Inc., Re* (2009), 58 C.B.R. (5th) 140 (Alta. Q.B.).

92 BIA, *supra* note 4, ss. 65.1(1), 66.34 and 84.2; CCAA, *supra* note 6, s. 34.

93 *Chandos Construction Ltd. v. Deloitte*, 2020 SCC 25 (S.C.C.) [*Chandos*].

94 *Chandos*, *ibid.*, para. 31.

95 *Ex parte MacKay* (1872-73), L.R. 8 Ch. App. 643 at p. 647 [*Ex parte MacKay*].

96 *Ex parte MacKay*, *ibid.*, p. 647.

97 *Westerman, Re* (1998), 8 C.B.R. (4th) 313 (Alta. Q.B.); reversed on other grounds (1999), 13 C.B.R. (4th) 296 (Alta. Q.B.).

98 *Knechtel Furniture Ltd., Re* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.).

99 *Price (Trustee of) v. Beach Gardens Resort Hotel Ltd.* (1994), 28 C.B.R. (3d) 156 (B.C. S.C.); affirmed (1995), 39 C.B.R. (3d) 31 (B.C. C.A.).

100 *Laing, Re* (1921), 2 C.B.R. 38 (Ont. S.C.).

101 In *Harrison, Re* (1880), 14 Ch. D. 19 (C.A.).

102 *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95 (Ont. C.A.).

103 *Canadian Imperial Bank of Commerce v. Bramalea Inc.* (1995), 33 O.R. (3d) 692 (Ont. Gen. Div. [Commercial List]).

104 *Daoust c. Cie de gestion Gar-Vin Inc.* (1982), 42 C.B.R. (N.S.) 50 (C.S. Que.).

105 *Canadian Long Island Petroleums Ltd. v. Irving Wire Products* (1974), [1975] 2 S.C.R. 715 (S.C.C.).

106 *Bakermaster Foods Ltd., Re* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.).

107 *Malka (Trustee of) c. Tye-Sil Corp.* (1990), 1 C.B.R. (3d) 305 (C.S. Que.); affirmed 1997 CarswellQue 162 (C.A. Que.).

108 *Barrington & Vokey Ltd., Re* (1996), 48 C.B.R. (3d) 270 (N.S. S.C. [In Chambers]) at paras. 39-40. See also, *Harrison, Re* (1880), 14 Ch. D. 19 (C.A.).

109 *Chandos*, *supra* note 94; *Auberge Gray Rocks Ltée, Re* (1995), 1 C.B.R. (4th) 91 (C.S. Que.); but see *Civano Construction Inc., Re* (1961), 4 C.B.R. (N.S.) 294 (C.S. Que.) in which a bonus on bankruptcy was enforceable.

110 See, *e.g.*, *Bhasin*, *supra* note 3; *Callow*, *supra* note 3; and *Wastech*, *supra* note 3.

111 *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 192 (Ont. S.C.J.); leave to appeal allowed (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) at paras. 33-34. While the court framed this as a matter of statutory discretion, query whether such a result could also be characterized as a public policy concern.

112 *Ibid.*, para. 29.

113 *609940 Ontario Inc. (Five Star Auto), Re* (1985), 57 C.B.R. (N.S.) 137 (Ont. S.C.) at para. 13.

114 *Levasseur, Auguer & fils Ltée v. Levasseur* (1963), 5 C.B.R. (N.S.) 76 (C.S. Que.).

115 *Daoust c. Cie de gestion Gar-Vin Inc.* (1982), 42 C.B.R. (N.S.) 50 (C.S. Que.) at para. 11.

116 *Ibid.*, para. 17.

117 *1183882 Alberta Ltd. v. Valin Industrial Mill Installations Ltd.*, 2011 ABQB 440 (Alta. Q.B.); affirmed 2012 ABCA 62, 2012 CarswellAlta 271 (Alta. C.A.); leave to appeal refused 2012 CarswellAlta 1596 (S.C.C.).

118 *Ibid.*, paras. 45-47.

119 *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409 (Ont. C.A.) at para. 19.

120 *Kitchener (City) v. Weinblatt*, [1969] S.C.R. 157 (S.C.C.).

121 *In the Matter of the Notice of Intention to make a Proposal of CIM Bayview Creek Inc.*, 2021 ONSC 220 (Ont. S.C.J.) at para. 44.

122 *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409 (Ont. C.A.) at paras. 33-37.

123 *Ibid.*, at paras. 38-44.

124 *Chandos*, *supra* note 94, para. 58.

125 *S. Funtig & Associates Inc. v. Windsor (City)* (2008), 46 C.B.R. (5th) 283 (Ont. S.C.J.) at para. 63.

126 *Erin Features No. 1 Ltd., Re* (1991), 8 C.B.R. (3d) 205 (B.C. S.C. [In Chambers]) at para. 7.

127 *Ibid.*, para. 4.

128 *P.I.A. Investments Inc. v. Deerhurst Ltd. Partnership* (1999), 13 C.B.R. (4th) 128 (Ont. S.C.J. [Commercial List]) at para. 4, ; affirmed on other grounds (2000), 20 C.B.R. (4th) 116 (Ont. C.A.).

129 *Ibid.*, paras. 25-27.

130 *Newitt, Re* (1881), 16 Ch. D. 522 (C.A.) at p. 531.

131 *Barrington & Vokey Ltd., Re* (1996), 48 C.B.R. (3d) 270 (N.S. S.C. [In Chambers]) at paras. 39-40; see also *Harrison, Re* (1880), 14 Ch. D. 19 (C.A.).

FARM CREDIT CANADA	and	14713737 CANADA INC.	Court File No: CV-25-00003786-0000
Applicant		Respondent	

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SUPERIOR COURT OF JUSTICE

Proceeding commenced at BRAMPTON

FACTUM OF ALBERT GELMAN INC.
(MOTION RETURNABLE
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